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• *Subordinate Magistrate*, if may take proceeding at the direction of the District Magistrate, when the person informed against does not reside within the local limits of the jurisdiction. Even on the direction of the District Magistrate a Subordinate Magistrate has no jurisdiction to draw up a proceeding under sec. 107, Criminal Procedure Code, against a person residing in another jurisdiction. In such a case the proceeding must take place and be brought to a conclusion before the District Magistrate himself. *NARBEEKAR CHANDRA MUKERJEE v THE EMPEROR* ... 580

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• s. 110

(a) (f)—*Bad character—Evidence, how to be considered where several persons are proceeded against and their association is proved—General*

repute, evidence of—How far admissible in a charge under cl.

(f)—*Judgment in appeal—Defects of.* Where in a proceeding under

sec. 110, Cr. P. C., it was clearly established that the

Petitioners, who were members of the same family being the father

and his 3 sons, were associated together and formed a gang, and the

evidence against all of them was the same. *Held*—That the case was one

in which the evidence against the

Petitioners could rightly be dealt with together and that any minute

inquiry into the complicity of each of the accused individually was not

necessary. How far evidence of general

repute may be taken into consideration in establishing the

charge under cl. (f) discussed. *Akhoy Kumar v. The Queen-Em-*

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• *Reference to High Court* by Presidency Magistrate—Presidency

Magistrate, whether should record evidence in a case under sec. 110,

where he has to make reference to the High Court—Sec. 362—Evidence

of repute—Association with bad characters—Previous conviction, value of, as evidence] Sec. 362, Cr.

P. C., does not apply to a case under sec. 110, Cr. P. C., in which

the Presidency Magistrate has to make a reference to the High Court

under sec. 123 (2), Cr. P. C., so as to absolve him from the duty of recording

evidence. But the record of evidence by the Presidency

Magistrate in such a case, need not be as full as in a similar case in the

Court of a Mofussil Magistrate. Evidence of association with bad

characters against the accused in a proceeding under sec. 110, Cr. P. C.,

is evidence of reputation, but such reputation can only be based upon

association with proved bad characters and not with reputed bad

characters. Previous convictions are not substantive evidence in a case

under sec. 120, Cr. P. C., though they may have an effect in deciding

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for what length of time the accused is to be bound down. *Shaik Babu v. Emperor*, 1. L. R. 33 Cal. 1036 (1906), distinguished. *Schein v. Queen-Empress*, 1. L. R. 16 Cal. 799 (1880), and *Emperor v. Tula Khan*, 1. L. R. 30 All. 334 (1908), referred to. *THE EMPEROR v. NEPAL SHIKARY* ... 318

ss. 133, 135, 137, 138, 141—*Conditional order under sec. 133—Application to show cause and also for the appointment of a jury—Illegality—Jury failing to do their duty—Magistrate's power to make order absolute without taking evidence.* The party against whom a conditional order under sec. 133, Cr. P. C., is made cannot both show cause against the order and ask for the appointment of a jury. Sec. 135, Cr. P. C., gives the person against whom the conditional order is made the right to adopt either of these alternatives. If he adopts the former alternative, the Magistrate is bound to take action under sec. 137, and if he adopts the second alternative, then the Magistrate is bound to take action under sec. 138. Both secs. 137 and 138 are imperative in their terms. The Magistrate has no discretion in the matter. Where the Petitioners against whom a conditional order under sec. 133, Cr. P. C., was made, applied to the Magistrate for showing cause against the order and also for the appointment of a jury but in the end elected to proceed with the application for the appointment of a jury, but the jury failing to submit their verdict within the ample time granted them by the Magistrate, the Magistrate proceeded under sec. 141 to make the order absolute; *Held*—The Magistrate was justified in making the order absolute without taking evidence under sec. 137, the Petitioners not having taken any action, after the jury had failed to perform their duty, to move the Magistrate for taking evidence in their behalf. *Semble*—The Petitioners might have been allowed, after the jury had failed to perform their duty, to revert to their application for showing cause and to adduce evidence, if they had moved the Magistrate for that purpose. *KISHORI LAL PANDE v. THE EMPEROR* ... 367

s. 144  
Prohibitory order under, how far invalidates findings of possession in sec. 145 proceeding. See s. 145 530

s. 144  
Stopping the erection of an em-

CRIMINAL PROCEDURE CODE—*contd.*

bankment which may cause loss to others—*Legality—Executive order—Magistrate's explanation supplementing the order passed.* Order under sec. 144, Cr. P. C., cannot be passed where the object of the order is merely to prevent pecuniary loss to any person. *Arayag Sing v. The Empress*, 1. L. R. 9 Cal. 103 (1882); *Isab Mondal v. The Emperor*, 8 C. W. N. 373 (1903), followed. Where the Deputy Commissioner ordered the Petitioner to stop the erection of an embankment on the ground that the erection might cause great loss to the Opposite Party and in his explanation to the High Court submitted that his order was an executive order having for its object the prevention of a disturbance of the peace; *Held*—That the order was illegal and should be set aside, inasmuch as it could not have been passed under sec. 144, Cr. P. C., its object being merely to prevent loss to the Opposite Party. *RAM AITAR SAHU v. KISHINUPUT RAM CHAUBEY* ... 188

s. 144  
Order issuing notice under—*Subsequent confirmation of the order on cause shown, whether extends the period of operation of the first order.* Where the Magistrate made an order issuing notice under sec. 144, Cr. P. C., against a person not to do a certain thing and directed him to show cause on a subsequent day against the order and on such cause being shown he refused to withdraw the order, *Held*—That the order issuing the notice was an order under sec. 144, Cr. P. C., and as such could remain in force for two months from its date and the confirmation of the said order on a subsequent day on cause being shown could not extend the period of its operation beyond these two months. *J. A. THOMSON v. THE EMPEROR* ... 195

s. 145  
"Enquiry," proceeding under sec. 145 whether—*Part-heard proceeding under sec. 145—Transfer of trying Magistrate—"Successor."* Proceedings under sec. 145, Cr. P. C., are enquiries within the meaning of the Code of Criminal Procedure. Under that Code enquiry means not only an enquiry into an offence, but extends to enquiry into matters which are not offences. When in the course of a proceeding under sec. 145, Cr. P. C., one Magistrate is transferred and another comes in his place, the latter, if of competent jurisdiction, can deal with the pro-

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 ceeding under sec. 360, Cr. P. O.  
 Sec. 360 Cr. P. O., ought to be  
 construed with all reasonable liberal-  
 ity. *ALI MAHOMED KHAN v. TAHAK*  
*CHANDRA BANERJI* ... 420

s. 145  
 —Proceedings under, if may be  
 instituted during the pendency of a  
 suit under sec. 9 of the Specific  
 Relief Act (I of 1877)—Prohibitory  
 order under sec. 144, how far in-  
 validates findings of possession in  
 sec. 145 proceeding.] A Magistrate  
 is not incompetent to proceed under  
 sec. 145, Cr. P. C., with regard to  
 properties which form the subject-  
 matter of a pending suit under sec.  
 9 of the Specific Relief Act. A  
 prohibitory order under sec. 144, Cr.  
 P. C., was passed against certain  
 landlords with respect to certain  
 lands in a proceeding to which the  
 tenants were not parties. Subse-  
 quently in a proceeding under sec.  
 145, Cr. P. C., the Magistrate found  
 that the landlords were in posses-  
 sion of the lands through their  
 tenants at a date when the prohibi-  
 tory order was still in force. *Held*—  
 That as the tenants were not parties  
 to the proceeding in which the prohi-  
 bitory order under sec. 144, Cr.  
 P. C., was made, the subsequent  
 finding in the proceeding under sec.  
 145, Cr. P. C., that the landlords  
 were in possession through the ten-  
 ants was not bad in law. *KISHORI*  
*LAL ROY CHOWDHURY v. SRINATH ROY* 530

s. 145  
 —Transfer of proceeding under, by  
 Subordinate Magistrate—Legality.  
*See s. 192 (2)* ... 530

s. 145  
 —Proceeding under—Postponement  
*sine die*, if legal—Regulation  
 VII of 1882, sec. 34.] A Magistrate  
 has no power to postpone *sine die* a  
 proceeding under sec. 145, Cr. P. C.,  
 on the ground that the estate or  
 area in which the land in dispute  
 is situate is under settlement by the  
 revenue authorities under the pro-  
 visions of Regulation VII of 1822.  
*ABDUL RAUF MIA v. RAHOMUDDIN*  
*BHUIA* ... 104

s. 145  
 —Proceeding under—Postponement  
*sine die*, whether legal—Attach-  
 ment pending disposal—Solemnity  
 previously executed and confirmed  
 by decrees, how far binding.] A  
 Magistrate has jurisdiction to post-  
 pone *sine die* a proceeding drawn up  
 under sec. 145, Cr. P. C. Where a  
 Magistrate after drawing up a pro-  
 ceeding under sec. 145, Cr. P. C.,  
 issued an order for attachment of  
 the disputed land till the disposal

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 of the case and subsequently he post-  
 poned the proceeding *sine die*. *Held*  
 —That the postponement *sine die*  
 did not operate as an withdrawal of  
 the order of attachment which con-  
 tinued in force till the disposal of  
 the case. How far the Magistrate  
 in passing final orders in a proceed-  
 ing under sec. 145, Cr. P. C., was  
 bound to act in accordance with a  
 solemnity previously executed by  
 the parties and confirmed by the  
 decrees of Civil Courts, considered.  
*GURU DAS HAZRA v. G. L. WEA-*  
*THERAL* ... 601

s. 145  
 (5)—Transfer of a proceeding  
 under sec. 145—The power of Magis-  
 trate to quash proceeding upon  
 transfer.] Where a proceeding under  
 sec. 145, Cr. P. C., drawn up  
 by a Deputy Magistrate was trans-  
 ferred by the District Magistrate to  
 his own file and then summarily  
 quashed. *Held*—That the District  
 Magistrate could only quash the pro-  
 ceeding in accordance with the pro-  
 visions of sub-sec. (5) of sec. 145,  
 Cr. P. O., on facts being brought  
 to his notice which were sufficient  
 to satisfy him that no dispute  
 likely to cause a breach of the peace  
 existed. That his order quashing the  
 proceeding on the sole ground that  
 he thought that the letter addressed  
 to him by one of the parties contain-  
 ed an admission that the other party  
 was in actual possession of the land  
 in dispute was without jurisdiction  
 and should be set aside. *Semble*—  
 If the District Magistrate after  
 transferring to his own file a pro-  
 ceeding under sec. 145, Cr. P. O.,  
 drawn up by a Subordinate Magis-  
 trate, quashed the proceeding on a  
 full consideration of all the facts  
 and after hearing the objections, if  
 any, of the parties, the High Court  
 would not interfere with the order  
 quashing the proceeding. *TARA*  
*CHARAN SARKAR v. BENGAL COAL CO.,*  
*LD.* ... 125

s. 145  
*See s. 145* ... 601

s. 147  
 —Rights contemplated by the  
 section, not merely easements—Form  
 of final order in a proceeding under  
 sec. 147—Limitation Act (XV of  
 1877), sec. 26.] Where the Magis-  
 trate in a proceeding under sec. 147,  
 Cr. P. C., disposed of the case by  
 his final order which ran thus:  
 "Srimanta Beta claims a prescrip-  
 tive right to pass the water of his  
 tank over the paddy land on the  
 south. He has entirely failed to  
 prove exercise of the right uninterru-  
 ptedly for twenty years. His

**CRIMINAL PROCEDURE CODE—contd.** Page  
 claim is therefore disallowed." *Held*—That by his order the Magistrate has not decided the case one way or the other and that the case must be sent back to him to pass a proper order on concluding his enquiry. That the Court in passing orders under sec. 147, Cr. P. C., should adopt the Form No. 24 in Sch. V of the Code of Criminal Procedure. That the right contemplated by sec. 147, Cr. P. C., is certainly of a more elastic description than the right which has to be strictly proved in terms of sec. 26 of the Limitation Act. *SRIMANTA BERA v. INDRA NARAYAN PRODHAN* ... 859

—Evidence before Police if admissible as corroboration. *See EVIDENCE ACT, s. 157* ... 197

—Confession, recording of, in presence of another Magistrate or person, and questioning of confessing prisoner by such Magistrate or person—Police custody, bearing of, on confession—Circumstances rendering confession invalid.] Where at the foot of a confession recorded, there was a memorandum signed by the recording Magistrate to the effect that he believed it was voluntarily made and the Sessions Judge held not only that that was the case but was also convinced that the confessing statements were true and formed a good basis for conviction: *Held*—That that did not preclude an Appellate Court from inquiring for itself into the character of the confession; on the contrary, it was a duty clearly incumbent on the Court of Appeal to take into consideration the circumstances which led up to the confession when its truthfulness and spontaneity were questioned by the defence. Where it was found that directly or indirectly pressure was brought to bear upon the accused through his relatives to make a confession and that the Police interviewed the accused in hajat several times and the District Magistrate himself impressed upon the accused the advisability of making a confession and the accused was kept in hajat for a long time, a portion of which he had to spend in a solitary cell, and the confession was recorded in the immediate presence of the District Magistrate who was personally interested in the case against the accused and some answers were elicited from the accused by some incriminating questions put to him and the accused retracted the con-

**CRIMINAL PROCEDURE CODE—contd.** Page  
 fession as soon as he got an opportunity to do so in Court. *Held*—That the confession was not voluntary and was not admissible in evidence against the accused. Where in recording a confession the only preliminary questions put to the accused were—"Do you know who I am? Any statement you make will be of your own free will. You are under no compulsion, I understand. What do you wish to say?", *Held*—That this was no compliance either with the letter or the spirit of the law on the vital point of questioning the accused before recording his confession. A Magistrate before recording the confession of an accused asked him several questions in order to satisfy himself that the confession was being voluntarily made, but omitted to ask whether the accused was brought from Police custody and it appeared that the accused was in Police custody for 8 days immediately before making the confession and that he was previous to this for a considerable period in hajat in a solitary cell, that he was confronted with another accused who had made a confession of a similar offence, that the Magistrate before recording the confession read the statements alleged to have been made by the accused to a police-officer, and during the recording of the confession, another Magistrate questioned the accused: and the confession was retracted as soon as the accused got an opportunity to do so in Court. *Held*—That the confession was not voluntarily made and was not admissible in evidence. When an accused person is brought before a Magistrate to get his confession recorded, it is highly irregular for the Magistrate to peruse the alleged statements of the accused made to and recorded by a police officer, before proceeding to question the prisoner. *Emperor v. Radhe Halwai*, 7 C. W. N. 220 (1902), approved. The fact and duration of Police custody of a confessing accused has a material bearing on the question whether the confession is voluntary or not. There is no warrant or justification for the intervention of a third party as a questioner, directly or indirectly, of a confessing prisoner. *JOGUBAN, SANTOSH AND SURENDRA v. EMPEROR* ... 861

—Bail—Remand. *See s. 498* ... 43, 51

(2)—Transfer of proceeding under sec. 145 by Subordinate Magis-

## CRIMINAL PROCEDURE CODE—contd.

*trate—Legality—Sec. 529—Curing of defect in transfer.]* A Subordinate Magistrate cannot be empowered under sec. 192 (2), Cr. P. C., to transfer proceedings under sec. 145, Cr. P. C. But a transfer of such proceedings made by a Subordinate Magistrate empowered under sec. 192 (2) is a legal defect curable by sec. 529. *Cr. P. C. Akbar Ali v. Dami Lal*, 4 C. W. N. 821 (1900), relied on. *KISHORI LAL ROY CHOWDHURY v. SRINATH ROY* ... 530

... s. 195.  
See SANCTION ... 542

... s. 195  
—Sanction for prosecution, whether should be given during pendency of civil litigation involving a decision of the same matter.] It would be a dangerous doctrine to lay down any hard and fast rule to the effect that a criminal trial or enquiry should of necessity be stayed simply because a civil suit has been instituted between the parties in which some or all the matters materially in issue in the criminal case would have to be determined, until the civil litigation was finally decided. *Jadu Lal v. Louis*, 11 C. W. N. 712 : s. c. I. L. R. 34 Cal. 848 (1907), explained. It is very desirable in the ends of justice that when a competent Court has taken upon itself the responsibility of ordering a prosecution under sec. 476, Cr. P. C., that the prosecution should be entertained as speedily as possible while the evidence on both sides is fresh. *Hem Chandra v. Atul Behary*, I. L. R. 35 Cal. 909 (1908), followed. But a Court may well hesitate to give sanction under sec. 195, Cr. P. C., to a private individual to prosecute his adversary for an offence alleged to have been committed during the pendency of a civil litigation before it has terminated. *BROJOBASHI PANDA v. THE EMPEROR* ... 398

... ss. 195,  
476—Sanction to prosecute and order for prosecution—Offence against public justice—Penal Code (Act XLV of 1860), sec. 209—Offence committed before Small Cause Court—Sanction granted by such Court revoked by District Judge—High Court or District Judge, if may order prosecution under sec. 476—High Court if may grant sanction under sec. 195, or set aside order revoking sanction—Powers of revision—Civil Procedure Code (Act V of 1908), sec. 115—Acting illegally in exercise of jurisdiction.] Where a Small Cause Court Judge granted sanction to the

## CRIMINAL PROCEDURE CODE—contd.

District Magistrate to prosecute the Petitioner for an offence under sec. 209, I. P. Code, and the sanction was revoked by the District Judge on the ground that a sanction could not be granted to a third party, but the District Judge nevertheless ordered the prosecution of the Petitioner under sec. 476, Cr. P. C., there being, in his opinion, a *prima facie* case against the Petitioner. *Held*—That neither the District Judge nor the High Court had power to order the prosecution of the Petitioner under sec. 476, Cr. P. C. *Begu Singh v. Emperor*, I. L. R. 34 Cal. 551 (F. B.) (1907), followed. That the High Court was not, for the purposes of sec. 195 of the Code, the Court to which the Small Cause Court was subordinate and so could not grant sanction under cl. (b) of sub-sec. (1) of sec. 195. That the High Court had jurisdiction to set aside the order of revocation and to restore the original sanction, under sec. 115 of the Civil Procedure Code, the District Judge having acted illegally in the exercise of his jurisdiction in revoking the sanction which had been properly granted to the District Magistrate. *Quere*—Whether the High Court had power under cl. (b) of sub-sec. (1) of sec. 195, to interfere with the order of the District Judge revoking the sanction. *Hamijuddi Mondal v. Damodar Ghose*, 10 C. W. N. 1026 (1906), is on this point in conflict with *Girija Sankar Roy v. Benod Sheekh*, 5 C. L. J. 222 (1906), and has been dissented from by a Full Bench of the Madras High Court in *Muthu Swami Mudali v. Veeni Chetti*, I. L. R. 30 Mad. 383 (1907). There is nothing in the statute law to limit the grant of sanction to a party to the proceeding in connection with which the offence aimed at was committed. Sanction to prosecute for an offence against public justice may best be granted to a public officer, for there can be no better recipient of such sanction. *In re Chandra Kanto*, 3 C. W. N. 3 (1898), distinguished. The principles relating to the grant of sanction to prosecute, and the reasons for the safeguards provided by secs. 195 and 476, indicated. Offences against public justice ought to be pressed primarily in the interests of public justice and never as a means of satisfying a private grudge." *RAM PROSHAD MALLA v. RAGHUBAR MALLA* ... 1093

... s. 197  
—Sanction under, whether should specify the offence with precision—

CRIMINAL PROCEDURE CODE—*contd.*

*Substantial compliance with the terms of the sanction.] Under sec. 197, Cr. P. C., the Government in granting sanction need not specify the offences with the same precision as is necessary in framing a charge. Where the order of the local Government sanctioning the prosecution of the accused directed the Inspector-General of Registration to instruct the District Registrar to institute a prosecution according to law and the District Registrar being himself the District Magistrate took cognizance of the case against the accused and summoned him and directed the actual trial to take place before a Special Magistrate to be appointed by the local Government, Held—That although taking cognizance of the case as District Magistrate was not the same thing as initiating the prosecution as the District Registrar, still the prosecution was instituted in substantial accordance with the order of Government. Reg. v. Vinayak Divakar, 3 Bom. H. C. R. Crown Cases, p. 32 (1871), distinguished. GIRWARDHARI LAL v. THE KING-EMPEROR ... 1062*

*s. 203*  
—Complaint, revival of Power of the Subordinate Magistrate to revive a complaint dismissed by him after District Magistrate has declined to order further inquiry.] There is nothing illegal in or ultra vires of a Deputy Magistrate reviving a complaint which he had dismissed under sec. 203, Cr. P. C., after the District Magistrate has, on an application made to him, declined under sec. 437, Cr. P. C., to order further inquiry into the complaint. JYOTINDRA NATH DAW v. HEM CHANDRA DAW ... 193

*s. 233*  
—One charge for cheating several persons on different occasions, bad.] Where one charge was framed against two persons charging them with cheating the complainant and two others on three different occasions, Held—That the charge was bad in law. Gul Mahomed Sircar v. Chaharu Mandal, 10 C. W. N. 53 (1905), and Johan Subarna v. King-Emperor, 10 C. W. N. 520<sup>e</sup> (1905), followed. SRISH CHANDRA MUKERJEE v. EMPEROR ... 1067

*ss. 233, 234*  
—Joint trial—Two offences of receiving property stolen from different persons at different times.] One trial for having been found in possession of stolen properties belonging to two different persons and stolen at different times is illegal.

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*Nanda Kumar Sirkar v. The Emperor, 11 C. W. N. 1128 (1907), followed. Subramania Iyer v. The King-Emperor, 5 C. W. N. 866: s. o. I. L. R. 25 Mad. 61 (1901), referred to. Manu Miya v. The Empress, I. L. R. 9 Cal. 371 (1882), not followed. ALI MAHOMED v. THE EMPEROR ... 418*

*ss. 233, 234*  
—Joinder of charges in respect of several offences committed within a year against different persons, whether legal—Extortion.] A person successively committing within the space of twelve months, several offences of the same kind, e.g., extortion, against different persons, may be charged with, and tried at one trial for, any number of them not exceeding three. Nanda Kumar Sirkar v. The Emperor, 11 C. W. N. 1128 (1907), doubted and distinguished. Manu Miya v. The Empress, I. L. R. 9 Cal. 371 (1882); Queen-Empress v. Juala Prasad, I. L. R. 7 All. 174 (1884); Queen-Empress v. Dhondi, Rat. Un. Cr. C. 331 (1887), followed. SRI BHAGWAN SINGH v. THE EMPEROR ... 507

*ss. 233, 235*  
—Transaction, whether one—Penal Code (Act XLV of 1860), secs. 408 and 420.] The Petitioner, a jamadar in the service of a firm, was entrusted with two cheques for encashment on the 20th September and told to pay thereby the freight and take delivery of certain goods from the Railway Company. He cashed the cheques on the 21st idem and on the 22nd when asked by the firm denied having done so. On the 26th idem he induced, under promise of immediate payment, a clerk of the Railway to give him delivery of the goods, and then without making payment he absconded. He was charged with the offences of criminal misappropriation and cheating under secs. 408 and 420, I. P. O., and was tried for the offences in one trial, Held—That the offence under sec. 408, I. P. C., was committed against the firm and was complete before the Petitioner cheated the Railway Company and therefore the two offences could not be tried together as they were not committed in one transaction. PARMESHWAR LAL v. THE EMPEROR ... 1089

*ss. 233, 239*  
—Charges—Misjoinder—Transaction, same, what is—Circumstances showing occurrence did not form the same transaction.] Where the accused, more than five in number, after having obstructed

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**CRIMINAL PROCEDURE CODE—contd.**  
 certain Civil Court peons in the execution of a decree, held a consultation, and then at the instance of two of them, all of them, with the exception of one or two, proceeded to the kitchen of the decree-holder in order to beat his son and his tehsildar, and brought out the tehsildar whom they took to the house of the judgment-debtor where they had obstructed the Civil Court peon, and violently assaulted him there. *Held*—That the two occurrences, the one of obstructing the execution of the decree and the other of assaulting the tehsildar, did not form one transaction and the accused could not be tried on charges arising out of both the occurrences at one trial. The second occurrence was clearly the result of an after-thought and there was then no further intention to obstruct the execution of the decree in the course of which the incidents of the first occurrence took place and it cannot be said that there was any continuity in the ideas or methods of the rioters. The fact that all the accused did not take part in the second occurrence and that the common object in respect of it was different from that in respect of the first occurrence shows that the two occurrences did not form parts of the same transaction. *Umed Dholchand v. Pir Sahab*, I. L. R. 7 Bom. 134, 135 (1883), distinguished. **LARKARI v. THE KING-EMPEROR** ...1113

s. 234.

*See CHARGE* ... 942

s. 234.

239—*Charges, misjoinder of—Penal Code (Act XLV of 1860), secs. 225 and 379, charges under—Joinder—Illegality.* Where one of the accused caught in the act of committing theft, was rescued by others while being taken to the thana by the complainant and some of the rescuers snatched away some clothes from the person of the complainant and the Magistrate tried all the accused jointly, two of them on charges under secs. 225 and 379, I. P. C., two on a charge under sec. 379, I. P. C., and the remaining two on a charge under sec. 225, I. P. C., *Held*—That the trial was illegal being vitiated by misjoinder of charges. Two separate trials were directed, one in respect of the original charge of theft and the other in respect of the rescuing and the theft committed in the course of the rescuing. **TILUKDHARI MAHTON v. EMPEROR** ... 804.

s. 235

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**CRIMINAL PROCEDURE CODE—contd.**  
*Illegal gratification—Taking bribe of Rs. 2 for the registration of each of seven documents presented together, whether, one offence—Transaction, one.]* Where the accused, a Sub-Registrar, was charged in one count with having received a bribe of Rs. 2 for each of seven *kobalas* presented together for registration, which were executed by one person in favour of seven different persons, *Held*—That the count did not amount to a charge of seven separate offences and there was no misjoinder of charges, having regard to the provisions of sec. 235, Cr. P. C. The question whether what was alleged in the count amounted to seven separate offences and seven different charges is one of fact. If the accused attempted to obtain Rs. 2 separately for each of the *kobalas* and was willing to register any of them on the receipt of the sum, then there would be seven separate offences. But if he was not willing to register any one of the *kobalas* unless Rs. 2 for each of the *kobalas* were paid then there would be one offence in one transaction. *Johan Subarna v. King-Emperor*, 10 C. W. N. 520 (1905), referred to. **GIRWARI LAL v. THE KING-EMPEROR** ...1062

s. 271

*Plea of guilty by accused if must be accepted.]* The provision of sec. 271, Cr. P. C., clearly leaves it open to the Court, after an accused has pleaded guilty, to refuse to accept the plea and lay the case before the jury or assessors, or in the case of a Magistrate to try the question of the accused's guilt himself. **SUKDEV TEWARI v. THE KING-EMPEROR** ... 552

s. 307—

*Reference to High Court by Sessions Judge disagreeing with the verdict of the jury—High Court's power in the reference to go into evidence—Opinion of the minority of the jury if to be considered.]* In dealing with a reference under sec. 307, Cr. P. C., the High Court must consider the entire evidence and give due weight to the opinions of the Sessions Judge and the jury, including the opinion of the minority of the jury when the verdict is divided. When a Sessions Judge after the jury have given their verdict disagrees with the verdict and decides to make a reference to the High Court, he may, after telling the jury his intention to do so, ask the jury to give their reasons for the verdict and record those reasons. But the circumstance that no such reasons have been re-

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CRIMINAL PROCEDURE CODE— <i>contd.</i>	
corded by the Sessions Judge does not warrant the High Court to decline to go into the evidence and to arrive at its own judgment after giving due weight to the views taken by the Judge and the jury as to the guilt or innocence of the accused. <i>Emperor v. Chellan, I. L. R. 29 Mad. 91 (1905)</i> , referred to. <i>KING-EMPEROR v. ANNADA CHARAN THAKUR</i> ...	757
—Approver, pardon granted to— <i>Reasons for granting pardon, omission to state, if vitiates proceeding.</i> Where the facts which led up to the tender of pardon appear on the record, the omission on the part of a Magistrate (other than a Presidency Magistrate) tendering pardon to an would-be approver under sec. 337, Cr. P. C., to state reasons, is not an illegality or irregularity which vitiates the proceeding under that section and renders the evidence of the approver inadmissible. <i>Deputy Legal Remembrancer v. Banu Singh, 5 C. L. J. 224 (1906)</i> , followed. <i>KING-EMPEROR v. ANNADA CHARAN THAKUR</i> ...	757
See s. 145 ...	601
—Remand—Bail. See s. 498 ...	43, 51
if applies to proceeding under s. 145. See s. 145 ...	420
—Trial de novo—Case of <i>defamation</i> —Final orders should be by Magistrate, who examines complainant.] Where on a transfer of a case the accused do not apply for a trial de novo the action of the Magistrate, in convicting the accused on the evidence recorded partly by the former Magistrate and partly by himself, is not strictly without jurisdiction. It is most desirable, however, in a case of defamation that the examination and cross-examination of the complainant should be held in the presence of the Magistrate who has seisin of the case and passes final orders therein. <i>BRINDABAN CHANDRA DAS v. ISHAQURDIN CHOWDHRY</i> ...	550
—Where a number of accused are tried together, the deposition of a prosecution witness read over to him in the presence of only the pleader of one of the accused is sufficient compliance with sec. 366, Cr. P. C., to render the deposition admissible against the witness on a charge under sec. 193, I. P. C. <i>EMPEROR v. RAKHAL CHANDER LAHA</i> ...	942

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CRIMINAL PROCEDURE CODE— <i>contd.</i>	
if applies when Presidency Magistrate refers to High Court under sec. 123. See s. 123 ...	318
—Heads of charge to jury when to be recorded.] The heads of charge to the jury should be written out by the Judge as soon, as possible after its delivery and while the facts are still fresh in his mind. Sec. 367 of the Criminal Procedure Code does not make it obligatory for the charge to be written out before delivery. <i>FANINDRA MOHAN BANERJEE v. THE KING-EMPEROR</i> ...	197
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—Further inquiry, grounds for ordering—Perusal of evidence—Statement of reasons.] It is the duty of the Judge, before directing a further inquiry against a person who has been discharged, to peruse the evidence and state the grounds which induce him to make the order. *ABINASH CHANDRA MITRA v. THE EMPEROR* ... 76

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decisions of English Courts are not necessarily a safe guide in interpreting sections of the Criminal Procedure Code. It is not correct to say that in exercising its discretion under sec. 498 of the Code in granting bail to under-trial prisoners, the High Court should confine its attention only to the question whether the prisoner is or is not likely to abscond. There may be other circumstances also which may affect the question of granting bail to accused persons who are alleged to have committed crimes of a grave and serious nature. It is the right of an accused person to demand that the charge against him should be tried without any unreasonable delay and such delay will dispose the Court to grant bail. Under sec. 167 of the Code a Magistrate, on the mere perusal of the entries in the police-diaries relating to the case to which the accused have no access, may from time to time authorise the detention of the accused in custody for a term not exceeding 15 days on the whole. Thereafter he can under sec. 344 by a warrant remand an accused for any term not exceeding 15 days at a time if sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by such remand. Where on the accused being placed for trial a police-officer of superior rank swore to the existence of evidence implicating the accused and it did not appear that the production of the evidence was being unreasonably delayed, bail was refused. Bail was allowed, however, to those in regard to whom the production of evidence was being unreasonably delayed. A Magistrate may commit an accused person who has been released on bail if a *prima facie* case is made out against him by the sworn testimony given before him. *RAJAH NARENDRA LAL KHAN v. THE KING-EMPEROR* ... 43

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—Bail, when to be granted—Object of—Non-bailable offence—Likelihood of absconding—Seriousness of offence charged—Evidence of complicity—What kind of evidence sufficient—Prosecution, opportunity to, to produce evidence—Remand—Conspiracy, case of—Cancellation of bail.] Petitioners who were charged with offences under the Explosives Act (VI of 1908) which are non-bailable and of a very serious nature, were refused bail by the enquiring Magistrate; *Held*, (per Mitra, J., Coxe, J., dissentiente) on an applica-



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tion to the High Court under sec. 498 of the Criminal Procedure Code for bail, that the main question for consideration was—were there reasonable grounds for believing that the Petitioners were guilty of offences of which they were accused? Other considerations must also arise and one of these which has always guided Courts of Justice both in England and India, is whether there are any grounds for supposing that the accused if released on bail, would abscond and attempt to escape justice by avoiding or delaying an enquiry or trial. An accused may ordinarily be released on substantial bail until reasonable grounds are made out for presuming his guilt. *In re Jphur Mull*, 10 C. W. N. 1093 (1906), referred to. If, after a remand, evidence of an incriminating character is not adduced and if the prosecution had already sufficient time to adduce such evidence, the Court would reasonably come to the conclusion that such evidence was not forthcoming at the time. It should then under sec. 497, cl. (2) of the Code release the accused on bail whatever be the nature of the offence, though the preliminary enquiry should proceed. *Manikam Mudali v. The Queen*, I. L. R. 6 Mad. 63 (1882), approved. Whether there are reasonable grounds or not for believing that the accused are guilty of the offences charged must be decided judicially, that is to say, there should be tangible evidence on which, if unrebutted, the Court might come to the conclusion that the accused might be convicted. The statement by a witness in the witness-box that he has seen a certain act done—an act of an incriminating character—may be sufficient. As to whether the witness can be fully relied on or not is a question for subsequent consideration. But if there be no evidence whatsoever or evidence of a very flimsy character on the face of it, the inference would naturally be, after a reasonable time has elapsed since the beginning of the enquiry, that there are no reasonable grounds for supposing that an accused is guilty. The prosecution must however have a fair opportunity, according to the nature of the case, of adducing evidence of a really incriminating character. The detention of an accused under trial is not intended to be penal but its object is to secure attendance. The seriousness of an alleged offence and some evidence of its perpetration by the accused would, however, justify detention. Bail allowed to an accus-

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ed person may be cancelled by the Magistrate if upon further evidence produced a case is made out against him. *JAMINI MULLIK v. THE KING-EMPEROR* ... s. 513 51

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515—Surety for another to keep the peace—Liability of surety when the bond of the principal is forfeited—Object of taking security for keeping the peace—Criminal Procedure Code (Act V of 1898), secs. 107, 514 and 515.] When a person executes a bond for keeping the peace under sec. 107, Cr. P. O., and another stands surety for him, on the breach of the bond the surety and the principal are liable to pay the penalty of their respective bonds, quite irrespective of the question whether the amount of the bond of the principal has been realised or not. The object of taking a security bond in such cases is not to obtain money for the Crown but to prevent crime and the liability of the surety is not co-extensive with that of the principal as in the ordinary cases of a surety for a debtor for the payment of his debt. *EMPEROR v. SALIGRAM SINGH* ... s. 517. 555

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contacted, to fit in with wrong theory of prosecution—Theory of case started before collection of evidence. The theory of a murder upon which prosecution proceeded in this case was arrived at by the Sub-Inspector of Police the day following the night of the occurrence; <i>Per curiam</i> —"It is scarcely necessary to say that a theory should succeed and not precede the collection of evidence, otherwise it is a matter of common knowledge that the evidence may be made to fit in with the theory such as the police-officer in this case propounded. EMPEROR v. GAYANATH DAS	622	30—Confession of co-accused, who pleads guilty at joint trial—Value as against the other accused.] When one of several accused on their joint trial pleads guilty, it is not always incumbent on the Court to accept the plea of guilty and remove him from the dock. The Court may for sufficient reasons refuse to accept the plea of guilty and continue to try him jointly with the other accused and then in the trial take his confession into consideration against the other accused. <i>Queen-Empress v. Pabaji</i> , I. L. R. 19 Bom. 195 (1894); <i>Queen-Empress v. Paltua</i> , I. L. R. 23 All. 53 (1900); <i>Emperor v. Kheora</i> , I. L. R. 30 All. 540 (1908), referred to and explained. SURESH TAWARI v. THE KING-EMPEROR	552
<b>EVIDENCE ACT, ss. 14, 15—Cheating—Evidence sufficient to prove offence—Evidence aliunde to prove intention or knowledge—Evidence of similar acts at or about the time of committing the offence—Admissibility.</b> Where the accused falsely telling one B that he was the manager of an estate and could procure for him (B) a post in the estate, induced B to pay him a sum of money as security for the post, but afterwards failed to keep his promise, <i>Held</i> —That the accused was guilty of cheating under sec. 420, I. P. C., as it was found at the time he made the promise that he was not in any way connected with the estate and there was no post of the nature promised by him vacant. The prosecution adduced evidence in this case to show that the accused had obtained or attempted to obtain, at or about the same time, sums of money from other persons under very similar circumstances, <i>Held</i> —That evidence aliunde was admissible as tending to establish a systematic course of conduct on the part of the accused and as negating the existence of any reasonable or honest motive. <i>Reg. v. Holt</i> , Bell's Crown Cases 280; s. c. 8 Cox. O. C. 411 (1830), distinguished. <i>Queen v. Francis</i> , 2 Crown Cases Reserved, 128 (1874); <i>Queen v. Rhoads</i> , L. R. 1899 1 Q. R. 77; <i>R. v. Bond</i> , (1906) 2 K. B. 389 at p. 424; <i>The King v. Wyatt</i> , (1904) 1 K. B. 188; <i>The King v. John Bond</i> , (1906) 2 K. B. 389 at p. 424; <i>Queen v. Ollis</i> , (1900) 2 Q. B. 758; <i>Queen-Empress v. Vajiram</i> , I. L. R. 16 Bom. 414 (1892); <i>John Makin v. The Attorney-General for New South</i>		s. 32 (1)—Petition of complaint if may be treated as dying declaration. See DYING DECLARATION	680
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		s. 157, if controlled by s. 162, Cr. P. C. Sec. 162 of the Criminal Procedure Code does not control sec. 157 of the Evidence Act. Oral evidence may be given of the statement made to the Police by a witness, in order to corroborate him at the trial. <i>Queen-Empress v. Bhairub Chandra Chuckerbutty</i> , 2 C. W. N. 702 (1898), distinguished. <i>Observations of Beaman, J., in Emperor v. Narayan Raghu Nath Patki</i> , I. L. R. 32 Bom. 111 (1907), dissented from. PANINDRA MOHAN BANERJI v. THE KING-EMPEROR	197
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		<b>SUBSTANCES ACT, ss. 4, 4A, 4B, 5, 6—Conspiracy, charge of—Ingredients necessary to support charge—Possession or control of an explosive substance within the meaning of the Act—Conduct, evidentiary value of.] In regard to a criminal charge, when an article is found in a room to which several persons have access, it cannot be held to be in the possession of any one of them. Where a bomb was found in one of the rooms of a house</b>	

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to which all the inmates of the house had access, *Held*—That it could not be held that a particular inmate was in possession of the bomb within the meaning of the Explosive Substances Act, although the finding of the bomb in a room assigned to one of the inmates, might be fair ground for imputing to him possession or control of the bomb within the meaning of the Act. *Queen-Empress v. Sangam Lal*, I. L. R. 15 All. 129 at p. 131 (1893), followed. The evidence of conduct of an accused person, unless it is incompatible with his innocence, is in fact a make-weight and nothing more, and care should be taken that it may not have an exaggerated effect. It depends upon temperament, surroundings and other circumstances as to how a man would act in a particular situation and all these combine to form a most fallacious basis for assured conclusions. It is dangerous to convict on a charge which covers a wide period of time and which is supported by evidence indefinite as to the point of time when the offence was committed. Where a charge of conspiracy against the accused was framed in these words:—"That you . . . on or between the 8th of June 1908 and 31st July 1908, at Midnapure, unlawfully and maliciously conspired to cause by an explosive substance, viz., a bomb, an explosion in British India of a nature likely to endanger life and thereby committed an offence, &c. . . ." *Semble*:—That the charge should have specified with what other persons the accused had conspired. In a criminal trial, two documents were made exhibits, one of which purported to be a record of contemporaneous statements made to the Police by an informer in their service and the other a document written up by a police-officer for the purpose of assisting the informer in connection with the evidence, which the Police then expected he would give, *Held*—That the statements contained in the documents were not evidence against the accused, but they were useful in so far as they tended to expose the methods employed in getting up the prosecution case. Their evidentiary value was in no sense constructive, but if anything, destructive of the case against the accused. *JOGIBAN GHOSH v. THE KING-EMPEROR* ... 861

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KIDNAPPING of married minor girl from father's house—"Lawful guar- dianship"— <i>Penal Code, sec. 161,</i> <i>Expl. 163—Misdirection to jury—</i> <i>Failure to place evidence fairly be-</i> <i>fore jury.</i> ] Where an accused was charged with having kidnapped a married Hindu girl under 16 years of age by taking her out of the keeping of her father, the father being alleged in the circumstances of the case to be the lawful guar- dian, what the Judge should have left to the jury was whether or not the father had been lawfully entrusted with the care or custody of the girl. The Judge had charged the jury as follows:—"Now the lawful guardian of a married woman is no doubt her husband. But there is the evidence before you that she came with the consent of the husband into the house of her father, if you believe such evidence. Therefore,		—, <i>See</i> CRIMINAL PROCE- DURE CODE, ss. 233, 239 ...	1113

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<b>MURDER</b> , conviction of, <i>when which of two persons gave the fatal blow not proved.</i> Where it was found that two of the accused struck the deceased several blows inflicting severe injuries, one of which was the cause of death, but it was not proved who struck the fatal blow; <i>Held</i> , Under the circumstances of the case, none of the accused could be convicted of murder by the operation of sec. 34, I. P. C., but each of them should be convicted under sec. 326, I. P. C. <i>GOURIDAS NOMASUDRA v. THE EMPEROR</i> ... 680	680	<b>"OPINION"</b> of jury—Divided verdict. See <b>CRIMINAL PROCEDURE CODE</b> , s. 307 ... 757	757
<b>NEWSPAPERS</b> (Incitements to offences) Act, s. 3— <i>Incitement to murder or any other offence—Meaning of—Intention of the writer, printer or publisher of the newspaper, no ingredient.</i> Under sec. 3 of Act VII of 1908 no question of the intention of the writer, printer or publisher of the newspaper arises. The simple question which arises for decision is a question of fact, namely, whether the newspaper printed and published by the press does contain any incitement to murder or to any offence under the Explosives Substances Act of 1908 or to any act of violence. In sec. 3 of the Act the words "any incitement" include direct and indirect incitement and the meaning of the word incitement is what is given in the dictionaries, e.g., to "move to action," to "stir up," to "stimulate," to "instigate" or to "encourage." <i>GRIJA SUNDAR CHUCKERBUTTY v. THE KING EMPEROR</i> ... 672	672	<b>ORDINARY ORIGINAL CRIMINAL JURISDICTION</b> of High Court. See <b>SPECIAL TRIBUNAL</b> ... 605	605
<b>NON-RESIDENT</b> , proceeding against, by Subordinate Magistrate—Jurisdiction. See <b>CRIMINAL PROCEDURE CODE</b> , s. 107 ... 580	580	<b>PARDON</b> , grant of, to, approver, without stating reasons, if vitiates proceeding. See <b>CRIMINAL PROCEDURE CODE</b> , s. 337 ... 757	757
<b>OATH</b> , omission to administer, on interpreter—Effect. Where a person who interpreted the deposition of a witness, had not taken oath, <i>Held</i> —That the omission to take oath under the provisions of sec. 5, sub-sec. (b) of the Indian Oaths Act, did not render the deposition inadmissible in evidence against the witness in a prosecution under sec. 193, I. P. C. The only effect of the omission of the interpreter to take the oath was to render it necessary for the prosecution to prove that the interpretation was made accurately. The Provisions of sec. 13 of the Indian Oaths Act are not confined to witnesses, but they apply to interpreters and even to jurors. <i>Queen v. Ramsodoy Chuckerbutty</i> , 20 W. R. Cr. 19 (1873), approved. <i>EMPEROR v. RAKHAL CHANDER LAHA</i> 942	942	<b>PECUNIARY LOSS</b> , stopping of, no object of order under s. 144, Cr. P. C. See <b>CRIMINAL PROCEDURE CODE</b> , s. 144 ... 188	188
<b>OATHS ACT</b> , ss. 5 (b), 13. See <b>OATH</b> 942	942	<b>PENAL CODE</b> , s. 34, conviction under, when which of two persons gave the fatal blow not proved. See <b>MURDER</b> ... s. 52—Good faith. See s. 499, <b>Exc.</b> 9 ... 340	340
		ss. 96, 97, 99, 100, 304— <i>Private defence, right of—Limits of the right.</i> The deceased S and 3 others who formed his party attacked with lathies the accused B and his party, three in number, as the result of a quarrel. One of the party of the deceased struck a blow on the accused which felled him to the ground. The accused rose up and inflicted a blow on the head of S, which fractured his skull causing death within a short time, <i>Held</i> —That under the circumstances of the case the accused did not exceed his right of private defence by inflicting the blow on the head of the deceased, as the circumstances were such as reasonably caused the apprehension that grievous hurt would, but for his action, have been the consequence of the attack that was being made upon him. A man in the predicament of the accused could not be expected to judge too nicely. <i>BHUT NATH DOME v. THE KING-EMPEROR</i> ... 1180	1180
		s. 99—Persons defending property if may constitute unlawful assembly. See s. 141 (4) ... 677	677
		s. 114. See s. 304A ... 362	362
		ss. 141 (4), 147, 148, 326— <i>Unlawful assembly—Persons defending their property, if may become members of—Right of private defence—Excessive violence used by some members—Responsibility of others who continued in it—Rioting—Misdirection—Charge to the jury.</i> When a number of persons were justified in resisting the theft of their crops they could not all be considered as members of an unlawful assembly with the common object of asserting a right to the land on which the crops stood, because some of their number exceeded the right of private defence. But if	

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after some of them had exceeded the right of private defence, others continued in the assembly aiding and abetting them, they could all be considered members of an unlawful assembly. In the matter of *Kalee Mundle*, 10 C. L. R. 278, 280 (1882), followed. In a case of rioting in which the accused were resisting the theft of their crops and some of them used excessive violence in the exercise of the right of private defence, the Sessions Judge in his charge to the jury ought to tell them that if the accused were justified in resisting the theft of their crops, they could not all be considered members of an unlawful assembly simply because some of them exceeded the right of private defence. But he should draw the attention of the jury to the fact that the question for their consideration in such a case, with regard to the guilt of the accused who did not exceed the right of private defence, was whether they continued in the assembly of those who exceeded that right, aiding and abetting them. *BAIJNATH DHANUK v. EMPEROR* ... 677

... s. 141 (4)—Unlawful assembly—Common object to maintain property if unlawful. There is no unlawful assembly when the common object is to maintain undisturbed the actual enjoyment of a right, sec. 141, sub-sec. (4) of the Penal Code not applying to such a case. *SILAJIT MAHOTI v. THE KING-EMPEROR* ... 801

... s. 143—Unlawful assembly—Persons assembled to protect their master's property and using necessary force—No offence.] There being a dispute between the zemindars and their tenants as to whether the tenancy was *nagdi* or *bhaoli*, the zemindars placed watchmen on guard in the fields to prevent the tenants from taking away the crops to their houses. The tenants nevertheless in large numbers armed with *lathies* went to the field with the avowed intention of carrying away the crops, which had already been cut, to their houses and while they were attempting to do so, a number of the zemindars' men came up, some armed with *lathies* and some with swords, to prevent the tenants from taking away the crops, and the result was that a fight took place in which persons on both sides were injured, some tenants receiving incised wounds, probably from the swords of the zemindars' men and some tenant being severely injured. On the prosecution of some of the zemindars' men

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on charges under secs. 147 and 148 and 113, I. P. C., *Held*—That as the accused were justified in protecting their masters' property and were entitled to use such force as was necessary to prevent the tenants from carrying away the crops, they could not be held guilty of the offences charged in the absence of a finding by the Sessions Judge that the common intention of the accused was to use more force than was necessary. That the assembly of the accused was not an unlawful assembly. *RAM KHELAWAN SINGH v. THE EMPEROR* ... 827

... ss. 147, 148. See s. 143 827

... s. 147—Charge, common object stated in, not made out—Another object found—Effect.] It cannot be laid down as a general proposition of law that a conviction under sec. 147 of the Penal Code cannot be supported whenever the common object of the assembly as stated in the charge is not precisely made out, the question in each case being whether the common object established agrees in essential particulars with the common object as stated in the charge. Where the common object as stated in the charge was to assault the complainant and his men who were cutting the paddy of their land and thereby to forcibly oust them from the land, but the common object found as established on the evidence was the maintenance by the accused of their possession of the land, *Held*—That the common object as stated in the charge was not substantially established. *SILAJIT MAHOTI v. THE KING-EMPEROR* ... 801

... ss. 149, 326—Severe hurt caused by individual in course of protection by servants of master's property. That the accused were not constructively guilty of the offence under sec. 326 read with sec. 149, I. P. C., by reason of the fact that one member of their assembly, who was not on his trial, inflicted severe injury upon one of the tenants, as there was nothing to show that it was not an individual act on the part of that member or that the assembly which, in its inception, was not unlawful, became an unlawful assembly subsequently. Each case of this kind must be decided on its particular facts. *Dhanuk v. Emperor*, 13 C. W. N. 677 (1908), distinguished. *RAM KHELAWAN SINGH v. THE EMPEROR* ... 827

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*cess and Public Works Cess Act (IX, B. C. of 1880), secs. 14, 94, 95—Object of—Return submitted under sec. 14 of the latter Act—False information in return.]* The object of sec. 94 and other sections of the Road-cess and Public Works Cess Act (IX, B. C. of 1880) was to secure that the person submitting a return should not submit one in which he under-valued his property for the purposes of the Road-cess and Public Works Cess. Where the Petitioner in a return submitted under the Road-cess and Public Works Cess Act stated that certain lands of his were held by a tenant, one R, at a rental of Rs. 2, but the Deputy Magistrate on evidence found that those lands were held by another tenant under him at a rental of Rs. 8 and that the object of the Petitioner in submitting the false return was to create evidence for his success in a civil suit instituted by him; *Held*—That under the circumstances of the case the Petitioner could not be held guilty of an offence under sec. 177 I. P. C. **MOHAMED WASIL v. THE EMPEROR** ... 191

*information—Alleged occurrence found not to have taken place—Persons mentioned as suspected.]* Where on an information lodged to the Police by the Petitioner alleging that there had been a burglary in his house and a sum of money and a mortgage bond had been stolen and that he suspected one K and his brother-in-law, one B, who, he said, would be benefited by the loss of the mortgage bond, the Deputy Commissioner directed an enquiry by a Deputy Magistrate who on enquiry found the information to be false and submitted his report to the Deputy Commissioner and the Deputy Commissioner directed the prosecution of the Petitioner under sec. 211, I. P. C., but this order having been set aside by the High Court, the Deputy Commissioner returned the record of the case to the Deputy Magistrate who had held the enquiry and the Deputy Magistrate on the examination of two more witnesses tendered by the Petitioner ordered his prosecution under secs. 182 and 211, I. P. C.; *Held*—That the order for prosecution was not bad in law under sec. 476, Cr. P. C. *Beju Singh v. The Emperor*, 11 C. W. N. 568; s. o. I. L. R. 34 Cal. 551 (1907); *Rahimudulla v. The Emperor*, I. L. R. 31 Mad. 140 (1908), explained. Where in his information to the Police, the Petitioner did not name any one as the actual

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offender but what he did was to report that a burglary or theft had taken place in his house and that he suspected that the opposite party had instigated it; *Held*—That the order for prosecution of the Petitioner under sec. 211, I. P. C., was justified, as it was found by the Magistrate that as a matter of fact no burglary or theft had at all taken place as alleged by the Petitioner. **BRJOSHASHI PANDA v. THE EMPEROR** ... 398

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..., s. 304A—*Interpretation and scope of secs. 304A and 336—Rash or negligent act—Definition of Abetment—Whether there could be any, of a negligent act—Two persons doing a rash or negligent act, but one's act causing death—Liability of both.]* Where by the bullet fired by the one or the other of two accused persons who were practising at target shooting at a place near which was a public road which the accused would have noticed if they had used the least circumspection, a man was wounded resulting in his death, *Held*—That both the accused were guilty of an offence under sec. 304A of the Indian Penal Code and that in such a case the one whose bullet struck the deceased and caused death cannot be held to be the only principal offender under sec. 304A, I. P. C., and the other whose shot did not strike the deceased, his abettor under sec. 114, I. P. C. *Reg. v. Salmon*, L. R. 6 Q. B. D. 79 (1880), followed. The definition of culpable rashness and negligence given by *HOLLOWAY J.*, in *Reg. v. Nidaparti*, 7 Mad. H. C. R. 119 (1872), adopted. The words "rash or negligent act" as used in sec. 304A, I. P. C., have the same meaning as the words "does any act so rashly and negligently" which are to be found in secs. 336, 337, 338, I. P. C. Sec. 304, I. P. C., does not create a new offence; its provisions are similar to those of secs. 337 and 338. When an act is done so rashly or negligently as to endanger human life or the safety of others, it is an offence under sec. 336, I. P. C., quite irrespective of the consequences that might follow and when such an act results in the death of a person, the offence becomes one under sec. 304A, I. P. C. **THE EMPEROR v. CORPORAL E. H. MORGAN** ... 332



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s. 420—Obtaining money by false representation—Promise to procure a post and to repay if post not procured—Cheating—Tests of criminality.] The accused falsely represented to the complainant that he would be able to appoint him (the complainant) to a lucrative post on a cash security of Rs. 1,000 of which a third was to be paid in advance when submitting application for the post. The complainant on the faith of this representation paid some money and made the application. Afterwards the accused told the complainant that if he (the complainant) did not get the post, he would get a refund of the money. On the accused's failing to keep his promise the complainant demanded the refund which the accused promised to make by instalments and actually paid one of the instalments; Held—That the accused committed an offence under sec. 420, I. P. C., as he obtained the complainant's money by a promise which he knew he could not fulfil and the fact that long afterwards under pressure the accused paid back a portion of what he had received could in no way affect his criminality. The test of the accused's criminality is not what he did months afterwards, but what was in his mind at the time when, and under what circumstances, he received the money from the complainant and whether the accused then intended to repay the same. EMPEROR v. DEBENDRA PRASAD	728
s. 499, Exc. 9—Defamation—Counsel or pleader—Privilege—Questions in cross-examination if to be limited to instructions—Question based on recollection—Good faith, presumption of—"Due care and attention"—Wrong inference—Express malice, proof of, necessary.] A pleader, specially in the mofussil of this country, where instructions are very commonly inaccurate and misleading, would certainly be at least as much justified in acting on his own recollection as on specific instructions in putting questions to a witness in cross-examination; and	

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because he has merely drawn a wrong inference from a fact recollected, that of itself, in the absence of express malice, should not take him out of the 9th Exception to sec. 499 of the Penal Code. When a pleader is charged with defamation in respect of words spoken to or written while performing his duty as a pleader, the Court ought to presume good faith and not hold him criminally liable unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as pleader for an indirect purpose. In <i>Re Nagarji Trikamji</i> , I. L. R. 19 Bom. 340 (1894), followed. UPENDRA NATH BAGCHI v. THE EMPEROR...	340
ss. 499, 500—Statement made by a person in answer to a query of his pleader shortly after the disposal of the case, whether amounts to an offence under—Legal adviser and client, relationship of, how long lasts.] Where the accused shortly after the disposal of a criminal case against him, brought by one B, stated openly in answer to a query of his pleader in that case that the origin of the criminal case was due to the fact that some one of the accused's party had said at a social gathering that B's daughter-in-law had eloped, and he was subsequently prosecuted for an offence under sec. 500, I. P. C., for making a statement defamatory of B, Held—That the statement of the accused did not constitute an offence of defamation under sec. 500, I. P. C., as it was not made with the intention of harming the reputation of any body. That the statement was made in answer to a natural question put to him by his legal adviser at a time when the relationship of legal adviser and client cannot be said to have ceased. DEBENDRA NATH SAHA v. BHAGRATH SHAHA	1087
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the evidence recorded was not sufficient for conviction, does not preclude the prosecution from afterwards showing that the evidence was legally sufficient to make out the offence against the accused. <b>KING-EMPEROR v. DEBENDRA PERSHAD</b> ...	973	<b>PUBLIC PATHWAY</b> —Obstruction, proceeding for—Option of person proceeded against. See CRIMINAL PROCEDURE CODE, s. 133 ...	367
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**SANCTION TO PROSECUTE** for perjury when to be granted—*Primary consideration—Discretion of Magistrate in according sanction—Improper exercise—Criminal Procedure Code (Act V of 1898), sec. 195—Indian Penal Code (Act XLV of 1860), sec. 193.* The primary consideration in a case of perjury under sec. 193, I. P. O., is that the false statement should be intentionally made. Where in a case in which sanction was asked for the prosecution of the Petitioner under sec. 193, I. P. C., for having made false statement in his cross-examination in a Court of justice, there was no finding by the Magistrate who granted the sanction that the false statement was intentionally made and there did not appear any evidence in the case of any such intention, *Held*—That the sanction was bad in law. Where the Petitioner who had been convicted and sentenced to imprisonment in a criminal case brought against him by certain Sonthals 17 years ago, having been asked in cross-examination whether he was ever convicted and sentenced to imprisonment in any criminal case brought against him by some Sonthals, denied having been so convicted and sentenced, and the trying Magistrate on being moved refused to grant sanction to prosecute him for perjury; *Held*—That the District Magistrate did not exercise his discretion properly in sanctioning the prosecution of the Petitioner without considering whether the false statement in any way affected his credibility and whether it was not possible for him to forget the circumstances of his previous conviction, and whether the question was at all relevant. *AZIBULLA SARGAR v. UDOY SONTHAL* ... 422

irregularity in, if vitiates trial. When sanction is asked for under sec. 195, Cr. P. C., for the prosecution of a person in respect of a criminal act alleged to have been committed by him, sec. 195 should be used in such a way as to give the person, against whom sanction is asked for or granted, the means of knowing precisely of what the alleged criminal act consists. It is right, therefore, when sanction is sought or granted in respect of statements contained in a long deposition that the particular statements alleged to be false should be specified. But under the provisions of sec. 537, Cr. P. C., a conviction cannot be set aside on account of a defect in the sanction, unless it is established that there has in fact

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FROM THE LIST OF HOLIDAYS PUBLISHED IN THE *Calcutta Gazette* there was a general belief that after the annual vacation the Civil Courts would re-open on 30th October last; but as a matter of fact the Courts in some places are said to have actually re-opened a day earlier as the holidays for Id-ul-fitr were in some places observed on the 27th and 28th and not on the 28th and 29th, by reason of the moon being reported to have been seen a day earlier. When the holidays commenced on the 25th September last it was not possible to declare the actual date of re-opening and the impression of the public that the Courts would re-open on the 30th October was shared by many officers who had come away from the stations during the holidays. The result is that many people who were to do acts, the time for performing which expired on the re-opening day, and were not aware that the Courts re-opened a day earlier, have been time-barred or otherwise greatly prejudiced. In the case of applications and appeals no doubt the provisions of sec. 5 of the Limitation Act are applicable and they may be entertained if presented the following day on sufficient cause being shown. But such an extension is not possible in the case of suits. This is but a single instance of the difficulties which may always arise from this uncertainty in connection with Mahomedan holidays and we invite the attention of the Legislature to it. The difficulties may probably be met by a provision permitting suits to be filed on the day following either of the two dates on which it is believed the holiday will fall.

THE PRONOUNCEMENT MADE BY HIS MAJESTY THE King-Emperor on the Jubilee of the Proclamation of 1858 by Queen Victoria of beloved memory, on the assumption by Her of the Government of India from the East India Company, cannot be regarded in the true sense of the term a Royal Proclamation.

It partakes more of the character of a speech from the Throne with reference to India. It refers more or less to current events and indicates the policy that is to be followed by His Majesty's Government with reference to them. It does not broadly delineate any general principles on which the Government of India is henceforth to be carried on, as was done in the Great Proclamation of 1858. It only refers to that Proclamation to explain in a rather apologetic manner that in some respects the policy laid down in the Proclamation has been pursued and in others "the advance may have sometimes seemed slow" but nevertheless it "has proceeded steadfastly and without a pause." In short the present Royal Proclamation reads like an apology on behalf of His Majesty's Ministers for the very slow compliance with pledges given to the Indian people under the Royal Proclamation of 1858 which has been very appropriately described by His Majesty as "The Great Charter of 1858."

IN ONLY ONE RESPECT THE PROCLAMATION OF 1st November, 1908, may be said to contain a definite pronouncement of policy for which the present document may hereafter find a place in the constitutional History of India. The passage we refer to runs as follows:—

From the first the principle of representative institutions began to be gradually introduced and the time has come when in the judgment of My Viceroy and Governor General and others of My counsellors that principle may be prudently extended. Important classes among you representing ideas that have been fostered and encouraged by British Rule, claim equality of citizenship and greater power, in legislation and Government. The politic satisfaction of such a claim will strengthen, and not impair existing authority and power. The administration will be all the more efficient if the officers who conduct it have greater opportunities of regular contact with those whom it affects and with those who influence and affect common opinion about it. I will not speak of the measures that are now being diligently framed for those objects. They will speedily be made known to you and will I am very confident, mark a notable stage in the beneficent progress of your affairs.

WE MAY TAKE THIS OCCASION TO BRIEFLY INDICATE the constitutional importance of the Great Indian Charter of 1858. After declaring the direct

assumption of government by the Crown and commanding allegiance of the Indian people, it goes on to give some definite pledges to the princes and people of India. Of these the most important are, the observance of treaties and engagements with the Indian Princes; the restriction on the extension of the Indian territorial possessions; assurance of peace and good government and consequent prosperity and advancement of the people of India; the observance of same obligations by the British Crown to the Indian subjects as to the subjects of any other part of the British territories; absolute toleration of all religious faiths in India; equal right of qualified Indian subjects to all offices under the Crown; right to land and all other ancient rights, usages and customs to be respected in the framing and administering of the law in India. After recital of these pledges, this truly royal document closes with extending clemency to those who took up arms against the Government in the Rebellion of 1857. It is superfluous to say that the Proclamation of 1858 displays such eminent statesmanship and embodies such broad and liberal principles of good government as is hardly to be met with in any other document of a similar character. It has truly been called the *Magna Carta* of India. It was given at a time and under circumstances which even from a historical point of view were by no means less critical than the series of events that led to the conferment of the Great English Charter.

IT IS APPROPRIATE THAT WE SHOULD POINT OUT why the Proclamation of 1858 is regarded as the corner-stone of the Indian constitution. It can hardly be questioned that the following passage in the Proclamation of 1858 was intended to and did in fact confer the right of British citizenship on Her Majesty's British Indian subjects.

We hold Ourselves bound to the natives of Our Indian territories by the same obligations of duty which bind us to all other subjects and those obligations, by the blessing of Almighty God, We shall faithfully and conscientiously fulfil.

Over and above the right of British citizenship, it guaranteed to the people of India the preservation of all the rights that they had enjoyed from before in the land, by right of inheritance according to their ancient laws as also other rights according to such laws, usages and customs. The passage in which this additional privilege was secured to them, and which has always been regarded as binding on the Legislature and Law Courts in this country, runs as follows:—

We know, and respect, the feelings of attachment with which Natives of India regard the lands inherited by them from their ancestors, and We desire to protect them in all rights connected therewith, subject to the equitable demands of the State; and We will that generally, in framing and administering the law, due

regard be paid to the ancient rights, usages and customs of India.

THE CLAUSE OF THE PROCLAMATION WHICH purported to secure to the natives of India the equal rights of British citizenship has, no doubt, not yet been given its full scope. But that is hardly any justification for contending that the constitutional status of His Majesty's native Indian subjects is different from that of any British subject in any other part of the Empire. The Charter of 1858 places India and the Indians on the same footing as any other member of the British Empire. The people of India are entitled as of right to claim the fullest privileges of British subjects. The passage we have quoted above from the King Emperor's recent Proclamation reveals a consciousness of this constitutional right of the Indians to claim representative form of government under the Charter of 1858. Hence His Majesty in promising an extension of representative institutions in India goes on to observe:

"Important classes among you representing ideas that have been fostered and encouraged by British Rule, claim equality of citizenship and great power in legislation and Government. The politic satisfaction of such a claim will strengthen and not impair existing authority and power."

This in fact gives the assurance that with the spread of education and more general demand for representative institutions, the Indian people are sure to get what as of right may be claimed by them under the Charter of 1858.

THE NEW LEGAL YEAR, WHICH IN ENGLAND commences after the long vacation, has been inaugurated by changes in practice and procedure, which although are at present of a tentative character, yet may before long lead to substantial reforms for which the profession and public have pressed for many years. The most important of these changes is the re-arrangement of the circuits with a view to assign daily work to the judges during the ensuing year. It will be remembered that we are opposed to the introduction of circuit system in any form amongst us. We object to it because in the first place it is sure to result in a waste of the judges' time, and next, because it is bound to increase the cost of litigation, civil and criminal. It remains to be seen whether the changes made in England would give sufficient work to the judges going on circuit. Arrangements have also been made for continuous London sittings in all the Divisional Courts including those for appeals and Crown cases. A further change is the new arrangement made for Chamber work according to which the work will be done by several of the judges in the place of the single Judge at Chambers.

REGARDING THE REPRESENTATION MADE BY THE Indian students that arrangements should be made by the Council of Legal Education for providing special instructions to them not merely in Hindu and Mahomedan law but also in the codified Criminal and Civil law of the country, we subjoin below the interesting remarks of the *Law Journal*. The observations of our English contemporary will show what serious misapprehension there is even in well-informed legal circles regarding the system of laws prevailing in India. No doubt the Code of Criminal Procedure has comparatively recently made some special provisions regarding the trial of British born subjects but barring these, the substantive Civil and Criminal law of the country is the same for Europeans and Indians with the exception of the law of inheritance and succession which in the case of Hindus and Mahomedans is governed by their ancient codes, customs and usages as interpreted by the superior Courts in India and the Judicial Committee of the Privy Council. The suggestion of founding an Imperial School of Law in London is a very sound one and should any such institution come into existence it would, besides imparting instructions to students from all parts of the Empire, help greatly in the development of the science of Jurisprudence.

THIS IS WHAT OUR CONTEMPORARY SAYS :—

Somewhat tardily, perhaps, the Council of Legal Education has now arranged for a supply of instruction in Hindu and Mohammedan law for the benefit of Indian students, and also for instruction in Roman-Dutch law, for the benefit of those who may hereafter practice on South Africa, Ceylon, or British Guiana. A complaint has, however, been recently made on behalf of Indian students that no special instruction is provided in the system of Indian law as distinct from Hindu and Mohammedan law. Criminal law, and property and contract law governing the rights of Europeans, are the subjects of special Codes and of many decisions of the local Courts and the Privy Council. This body of law requires special study for practical purposes, and the whole constitutional frame-work of India should undoubtedly be specially studied by any one who intends to practise in India. The law of India relating to Europeans is a body of law which differs far more widely from the English law of the United Kingdom than does the legal system of any one of the self-governing dominions like Canada or Australia, and even in those parts of the Empire the necessity for special and local legal knowledge is daily increasing. The complaint of the Indian student seems to afford a fresh opportunity of pointing out what an extremely desirable thing in the interests of British jurisprudence it would be that an Imperial School of Law should be set up in London, the heart of the Empire, where every system of law prevailing throughout the King's dominions should be represented, including the varieties which in Canada and Australia are generally differentiating into what may eventually become new species.

BAIL IN CASE OF UNDER-TRIAL PRISONERS.

[General principles—Liberty of the subject]. The present Article deals only with the question of the principles underlying the grant or refusal of bail in the case of under-trial prisoners. In the consideration of this subject there are two fundamental rules that ought never to be lost sight of by the Courts. In the first place the right of the King's subjects in India to liberty is founded on almost as stable and constitutional a basis as the right of His Majesty's subjects in England or in other portions of the British Empire (*Queen-Empress v. Abdul Kadir*, I. L. R. 9 All. 452, 456). The law is just as jealous of personal liberty in India as in England, and that liberty cannot rightly be taken away except under circumstances which are clearly prescribed by positive law (*Re Surendra*, 5 B. L. R. 274, 289, Phear, J.). To deprive any person of his liberty is a most serious step, and every step in the process should show extreme deliberation and care (*Re Daulat*, I. L. R. 14 All. 45, 47). Neither the Magistrate, nor the Judge, nor the High Court is empowered by law to put a man in prison simply because he has an evil reputation (*Emperu v. Babua*, I. L. R. 6 All. 132, 137). It is not for him who is free and who has not transgressed the law to show why he should remain free: it is for him who wishes to take away that freedom or wishes to qualify it to prove circumstances which would operate in defeasance or derogation of that freedom (*Queen-Empress v. Abdul Kadir*, supra, p. 460). The next cardinal principle, which is one founded on the Code itself, is that a Magistrate is not competent to refuse bail unless the law sanctions such refusal (*In re Kookor*, C. L. R. 130).

[Bail by Magistrates]. Secs. 344 and 497 cover the cases of bail by Magistrates in non-cognizable cases. The terms of sec. 344 clearly indicate the existence of evidence when the remand is made. When the accused is placed before the Magistrate, sec. 208 requires him to proceed at once with the inquiry, but sec. 344 allows him to adjourn the case and remand the accused if witnesses are absent or for other "reasonable cause." The *Explanation* shows that there must be some evidence at the time, though it may amount only to a suspicion of guilt. It is true that the *Explanation* did not exist in the corresponding sec. 224 of the Code of 1861, and that it is somewhat differently worded from the *Explanation* to sec. 194 of the Code of 1872, but the earlier rulings show that the learned Judges did consider the existence of the circumstance set forth in the *Explanation* as justifying a remand: so that there is no practical difference between the present law and as it then existed. It is somewhat difficult to understand why if, as the *Explanation* says, there is sufficient evidence obtained to raise a suspicion of guilt, that evidence should not be placed before the Court at once as a justification



for the remand, instead of such fact being operative only as a reasonable cause for a remand. Of course it is possible that it might not be advisable to place the evidence already obtained before the Court before the expected evidence has been got owing to a special bearing the latter may have on the former. But in such a case the reason for withholding such evidence on the first occasion should be explained to the Magistrate as a matter of common fairness to the accused (See *Ponnuhami Queen*, I. L. R. 6 Mad. 69). In the absence of any explanation to that effect there will always be a lurking suspicion that the proceedings are not above board.

In *Queen v. Mohesh Chunder*, 13 W. R. Cr. 1, it was distinctly held that before committing an accused to jail, otherwise than for mere temporary custody, the Magistrate must be satisfied on evidence that some case is made out against the prisoner or that there are reasonable grounds, for believing him to be guilty. When a prisoner is brought before the Magistrate he cannot lawfully be committed to prison without sufficient grounds, and in the absence of evidence there can be no grounds (*Queen v. Surendra*, 5 B. I. R. 274). Where there is no evidence taken which could be the foundation of a charge, a Magistrate is not justified in remanding the accused on the expectation that by dint of inquiry some evidence might be obtained (*Muthoora v. Heera*, 17 W. R. Cr. 55, 56, 57). When a prisoner is brought before the Court the Magistrate has no authority further to detain him without some reason made manifest to him either in the shape of sworn testimony or in some other form which can be put on the record sufficient to justify a remand (*Queen v. Abdool Kadir*, 20 W. R. Cr. 23, followed in *Manikam v. Queen*, I. L. R. 6 Mad. 63). A Magistrate cannot retain an accused in custody except on 'a proper remand after taking sufficient evidence on oath or affirmation' (*Re Zuhuddeen*, 25 W. R. Cr. 8).

In *Manikam v. Queen*, I. L. R. 6 Mad. 63, it was held that a remand for five days and a further remand for four days was justifiable where evidence was available, but where it was necessary to adjourn for further evidence so that the inquiry may be continuous. But it was also held that an accused had a right to have the evidence recorded as early as possible and that the fact that there was a great body of evidence forthcoming did not justify a remand for an inordinate period, and further that on remand the Magistrate was bound to record the reasonable cause for which such action became necessary. A Magistrate must take care that his proceedings are conducted with such reasonable expedition as will prevent the parties from being improperly harassed by undue delay. (*In re Lakshman*, I. L. R. 26 Bom. 553, and see the judgment of Coke, J., in *Raja Narendra Lal v. Emperor*, Cr. Rev. Misc. No. 134 of 1908).

Even if the *Explanation* to sec. 344 has rendered the Calcutta casts under the Codes of 1861 and 1872 noted above obsolete, and the section justifies a first remand on the evidence of a police-officer that they have credible information against the accused, still when a further remand is needed some direct evidence of the guilt of the accused should be offered, and with each remand the necessity for production of guilt becomes stronger (*Ponnuhami v. Queen*, I. L. R. 6 Mad. 65). The High Court will not interfere with the discretion of a Magistrate, who has granted bail in a non-bailable case on the grounds of the delay of the commencement of the inquiry and the respectability of the accused, where the prosecution, after the Magisterial inquiry has begun, does not tender evidence of the accused's guilty connection with the offence (*Queen-Empress v. Lakshman Ratanlal*, Unreported Cr. Ca. 892). The deposition of a police-officer of superior rank was held in *Raja Narendra Lal v. Emperor*, Cr. Rev. Misc. No. 134 of 1908, that he had evidence, which he believed, incriminating the accused was held sufficient for a remand. But it would appear, that the section contemplates not that the Magistrate should accept the bare word of a police-officer, but should require him to state at least the general outline of the evidence obtained and the evidence expected, so as to satisfy himself, within the terms of the *Explanation*, that the existing evidence does really create a suspicion of the prisoner's complicity in the offence. A mere statement of a police-officer ought not to satisfy the Magistrate that a suspicion of the accused's complicity is established. This is a question for the Magistrate to decide, and not the police-officer. The Magistrate must form a judicial opinion as to whether the evidence creates such a suspicion, and he can only arrive at a conclusion that it does by being informed of the nature of the evidence in the hands of the police. Further the requirement of the section that the Magistrate must state his reasons for the adjournment seems to support this view. (Cf. *Queen v. Abdool Kadir*, 20 W. R. Cr. 23, and *Manikam v. Queen*, I. L. R. 6 Mad. 63).

Sec. 497 applies only where some evidence has been recorded, and makes it obligatory on the Magistrate to grant bail when there are not reasonable grounds for believing in the prisoner's guilt but where a further inquiry is necessary.

[*Bail by High Court*].—The test provided for the granting or refusing bail by a Magistrate under sec. 497 is the character of the evidence. But sec. 498 is not controlled by sec. 497 and it is open to the High Court to grant bail for any good and sufficient reasons (*Re Kamaraja*, 2 Weir 656). Sec. 498 gives very wide powers to admit to bail even where an accused has been convicted of a non-bailable offence and has not appealed. (*King-Emperor v. Badri*, 5 All. L. J. 419, 420). It must be conceded that under sec. 498 the power of the

High Court to grant bail is not limited to the consideration of the question of the possibility or the accused absconding, and that the strength or weakness of the evidence, the gravity of the offence, the punishment prescribed therefor, the delay in recording evidence, the status in life of the accused, his proprietary interests and other important circumstances are also factors in the decision of the question. But having regard to the fact that the object of bail with sureties is only to ensure the attendance of the accused to stand his trial, it would appear that the determining factor is the likelihood of his absconding. The strength of the evidence, the seriousness of the offence and the amount of punishment resolve themselves ultimately into the same question whether or not he would appear at the trial, inasmuch as these afford the strongest presumption that he would not. *In other words these facts are to be considered only to estimate the possibility of his attendance or of absconding.* The amount of the bail, the interest of the sureties in producing the accused, the inference from flight, and the possibility of ultimate capture would, however, be ordinarily sufficient to meet the presumption arising from these adverse facts.

There are few Indian cases on the subject, but it was held in *In re Johur Mull*, 10 C. W. N. 1093, which was a murder case, that an accused person ought to be released on bail until reasonable grounds are made out on the evidence for believing him to be guilty. In *King-Emperor v. Badri*, 5 All. L. J. 419, it was held that even in a case of attempt to murder an accused might be admitted to bail, and the High Court refused to cancel the bail granted by a Sessions Judge in such a case on proper grounds. In the Bank of Bengal forgery case, some three or four years ago, where the accused had forged four Government papers of Rs. 25,000 each, Woodroffe and Mookerjee, JJ., granted bail. In the recent case of *Jamini Mullic v. Emperor*, Cr. Rev. Misc. Nos. 140-142, Mitra, J., followed the rule laid down in *In re Johur Mull*, supra. The principle that absence or weakness of evidence justifies bail is deducible from sec. 497 (2). But this is really another phase of the question of the likelihood of the accused absconding, it being a circumstance in favour of the probability of his attending Court when required, just as the strength of the evidence would lead to a contrary supposition.

It is true that the English law of Procedure is not necessarily a safe guide in the interpretation of an Indian Statute (25 *Mad.* 61, 80; 27 *Cal.* 830, 844; 5 *W. R. Cr.* 80, 92; 7 *Bom. H. C. R.* 39, 41; 30 *Cal.* 36, 76; 21 *Cal.* 262, 264; 35 *Cal.* 141, 150 and see also *Raja Narendra Lal v. Emperor*, Cr. Rev. Misc. No. 134 of 1908), yet where no provision is made for a particular matter in an Indian Act, and there is nothing repugnant in it to the English law, the latter may be safely followed as a guide.

No rule has been laid down in sec. 498 as to the grounds upon which the Sessions Court and the High Court may exercise their unfettered discretion. The question of the principles on which bail should be granted or refused is one that is common to every system of jurisprudence, unless determined by the Municipal law of a particular country. What is a good ground for granting bail in England would certainly be a safe guide as a ground under sec. 498, though not under sec. 497, as the Legislature has itself provided in the first two clauses of that section when an accused should or should not be allowed bail. The English substantive law and practice have been adopted as safe guides in several instances in India, e.g., as to the verdict of a jury (*Reg. v. Khanderav*, 1 L. R. 1 Bom. 10; also 1 L. R. 9 Cal. 53 and 1 L. R. 15 Bom. 450); as to the cross-examination of prosecution witnesses not called at the Sessions (*Reg. v. Fattahchand*, 5 Bom. H. C. R. 85, 89). In *Emperor v. Bal Gangadhar Tilak*, 1 L. R. 28 Bom. 479, it was observed that the Indian system of Criminal law was largely drawn from the English law, and that where the provisions peculiar to Indian law do not apply, a rule of English law (as to the proof of perjury by two witnesses or one witness corroborated) which is founded on substantial justice might well serve as a safe guide for the Indian Courts. In *In re Robinson*, 23 L. J. Q. B., it was held that the test to govern the discretion of the Court in granting bail is the probability of the prisoner's appearing at the trial, though in applying that test the Court will be guided by the nature of the crime, the severity of the punishment prescribed for it and the probability of a conviction. This is precisely the view that I have endeavoured to establish in the course of this Article. The same rule was laid down in *Reg. v. Scaife*, 10 L. J. M. C. 144. In the recent case of *Reg. v. Rose*, 18 Cox. C. C., it was ruled that bail is not to be withheld unless it is otherwise impossible to ensure the prisoner's attendance at the trial. The recent Circulars of the Home Secretary to the Magistrates have endorsed the spirit of these views.

In the recent Midnapore bail cases the exclusion of the two confessing prisoners, Santosh Das and Surendra Mookerjee, is supported by the English case of *In re Barronett*, 1 El. and Bl. 1. The clogging of the order of bail with certain conditions in the case of the Raja of Marajole appears to be contrary to *Q. v. Surendro*, 13 W. R. Cr. 27, p. 32. See also *Re Mohesh Chunder*, 13 W. R. Cr. 1, and *Gopinath v. Emperor*, 10 C. W. N. 82, 90. But of course the Raja consented to them and cannot complain.

E. H. MONTGOMERY.

## THE LAWYER PRESIDENT OF THE REPUBLIC OF THE U. S. OF AMERICA.

The election of William H. Taft as the President of the United States Republic marks another triumph for the profession of law. The position that Mr. Taft has attained is second to none of the crowned heads of the world. In one respect the position of the President of United States is entitled to greater respect than those of ruling monarchs since it depends on the suffrage and choice of a 'civilized people and not on the mere accident of birth.

That a man born and bred in the atmosphere of law has attained this singular distinction by his own merit and sterling qualities reflects great honour to the profession to which he belonged. It must not however be supposed that this is the first time that a lawyer has worked up his way to the Presidency.

The July number of *The Green Bag* contains a biographical sketch of Secretary Taft (now President) to which we are chiefly indebted for the facts of this article.

The President's father, Alphonso Taft, was a lawyer of great learning, had been a Judge of the Superior Court of Cincinnati and had been in active practice for forty years. He was, moreover, a man of great public spirit, intensely interested in all questions affecting Government and held during his distinguished career such high offices as Secretary of War, Attorney-General, American Minister to Austria and Russia.

The President and his four brothers all received legal training and all at one time were actively engaged in the practice of law. One of his brothers is still a leading member of the New York Bar.

In his father's house, the law, the constitution and other public questions were always important topics of conversation and surely it was here that William Taft learnt to take interest in public matters early in life. But, it was to his thorough and varied legal training that the subsequent success in his life must be attributed.

He received his legal education in the Cincinnati School of Law from where he graduated as the first man of his year and commenced practice in the Supreme Court of Ohio.

In the early days of his practice he took to law reporting, which helped him a great deal in acquiring a practical knowledge and experience of the law and brought him in personal contact with the judges, the leading lawyers and in fact with all concerned in the practice of the law. He was soon selected as Assistant Prosecuting Attorney and in that position he obtained considerable distinction in prosecuting Campbell, a criminal lawyer of great ability but thoroughly unscrupulous, for disbarment.

His industry, thoroughness, ability and in no

less degree his integrity soon marked him out as the most promising junior member of his Bar. In 1888 he was appointed a Judge of the Superior Court of Cincinnati. On the Bench, so great was his reputation for fairness, thoroughness and knowledge of the law, that leading lawyers sought to time the trial of important cases so that they might come before him. His decisions are greatly valued as precedent to this day.

Within a year and a half of his elevation to the Bench, the responsible position of the Solicitor-General of the United States falling vacant he was appointed to that high office. In this capacity he very ably and forcibly put the case for his country in the dispute that arose between America and Great Britain (Canada) regarding seal fishery in the Behring Seas and the American sovereign rights in the Straits.

Later on he was made a circuit Judge of appeals and as such commanded great respect by his fair and fearless decisions in labour and capital dispute cases. His interpretation and application of the Sherman Anti-Trust Act was approved of and upheld by the highest tribunal of his country. The secret why his decisions even in such highly contentious matters commanded public confidence lay in the fact that he gave them without fear or favour or without respect to persons. His aim was to ascertain the law and then declare it regardless of individuals or combination of individuals who might be affected by them.

In the midst of his judicial labours he at all times had in mind the improvement of facilities for the administration of justice and the maintenance of high standard at the Bar, and he made opportunities for carrying his purposes into effect. He was instrumental in founding a splendid law library, and in advancing the cause of legal education in Cincinnati. His judicial career came to a close in 1900 when President McKinley appointed him to be the President of the Philippine Commission. In 1901 he was made the first civil Governor of the Philippines. Like all conscientious men he at first hesitated to accept these offices, as he felt that he might not prove equal to the task entrusted to him. But he soon justified his selection. He had long aspired to be a Judge of the Supreme Court but while in the Philippines he twice declined President Roosevelt's offer of such judgeship because his task in the Philippines, which he regarded in the light of a mission, had not then come to a close. The work in the Philippines had special attraction for him because, as he said to his friends, "he wanted to do those people good." His success in life is attributed to his strong and sound common sense, abundant good humour, combined with physical strength, phenomenal capacity for labour, a good memory, tenacity of will and that "indefinable something called character," wherein lies the true seat of all greatness.

## INEQUALITIES OF ADMINISTRATION OF JUSTICE.

By PRESIDENT TAFT.

The September number of the *Green Bag* publishes an address by The Hon. William H. Taft on the Inequalities of Administration of Justice. Many of the matters which he discusses there possess special interest for the lawyers, the judiciary and the legislature in India. It is a strange coincidence that his observations regarding the simplification of the statutory laws would seem to have special application to the method adopted in the new Code of Civil Procedure. He is a great admirer of the system obtaining in the English Law Courts regarding the regulation of the procedure of the Courts by rules and orders framed by the High Court, as his following observations will show.

Our codes of procedure are generally much too elaborate. It is possible to have a code of procedure simple and effective. This is shown by the present procedure in the English Courts, most of which is framed by rules of Court. The code of the state of New York is staggering in the number of its sections. A similar defect exists in some civil law countries. The elaborate Spanish Code of procedure that we found in the Philippines when we first went there could be used by a dilatory Defendant to keep the Plaintiff stamping in the vestibule of justice until time had made justice impossible. Every additional technicality, every additional rule of procedure adds to the expense of litigation. It is inevitable that with an elaborate code, the expense of a suit involving a small sum is in proportion far greater than that involving a large sum. Hence it results that cost of justice to the poor is always greater than it is to the rich, assuming that the poor are more often interested in small cases than the rich in large ones—a fairly reasonable assumption.

I listened with much pleasure to the discussion yesterday in respect to the proposed amendment to your procedure in Virginia, and I was reminded of a discussion of the same subject by that great lawyer, Mr. James C. Carter, of New York. He was the leader of the opposition to the New York Code, and had to meet Mr. David Dudley Field, who was its chief supporter. Mr. Carter impressed me with, having, in that particular discussion the better side. He showed that under the Massachusetts procedure (which is, I fancy, not unlike yours in Virginia, to wit, a retention of the common law forms of action, together with the division between law and equity, with modifications to dispense with the old technical niceties of common law and equity pleadings), the decisions on questions of practice and pleading in Massachusetts were not one-tenth of those arising under the code of New York, and his argument was a fairly strong one in support of the contention which I heard here yesterday, that it was better to retain the old system and avoid its evils by amendment than to attempt a complete reform. However, it is to be said that a study of the English system, consisting of a few general principles laid down in the practice act, and supplemented by rules of Court to be adopted by the High Court of judicature, has worked with great benefit to the litigant, and has secured much expedition in the settlement of controversies, and has practically eliminated the discussion of points of practice and pleading in the Appellate Courts. My impression is that if the judge of the Court of last resort were charged with the responsibility within general lines defined by the Legislature for providing a system in which the hearing on appeal should be as far as possible with respect to the merits and not with respect to procedure, and which should make for expedition, they are

about as well qualified to do this as any body to whom the matter can be delegated.

His argument in support of the practice amongst Judges in the Courts of first instance in England of delivering judgment immediately at the close of argument is so convincing that we should like to see the same practice followed in all the Courts of first instance in India.

In English Courts the ordinary practice is for the Judge to deliver judgment immediately upon the close of the argument and this is the practice that ought to be enforced as far as possible in our Courts of first instance. It is almost as such importance that the Court of first instance should decide promptly as that it should decide right. If Judges had to do so, they would become much more attentive to the argument during its presentation and much more likely to the whole to decide right when the evidence and arguments are fresh in their mind.

That delay in the administration of justice, matter whether it arises from complication in the laws or procedure or defects in its administration, always proves oppressive to the poor, is explained by this eminent lawyer in the following terms.

It may be asserted as a general proposition to which many Legislatures seem to be decisive, that everything which tends to prolong or delay litigation between individuals and corporations, is a great advantage for that litigant who has the longer purse. The man whose all is involved in the decision of the law suit is as much prejudiced in a fight through the Courts, if his opponent is able, by reason of his means, to prolong the litigation and keep him for years out of what really belongs to him. The wealthy Defendant can almost always secure a compromise or yielding of lawful rights because of the necessities of the poor Plaintiff.

## CURRENT INDIAN CASES.

AYESABAI v. EBRAHIM, I. L. R. 32 Bom. 364.  
*Executor—Liability—Renunciation.*

"In law a very small interference or intermeddling with the estate of the testator on the part of a party appointed executor under a will is sufficient to charge him with liability as executor" (Per Davar, J.).

An executor once having acted cannot renounce that character; if he subsequently renounces it is void.—*Ibid.*

A suit for an account against an executor is not governed by sec. 10 of the Limitation Act; in such a suit the Plaintiff is entitled to an account for six years preceding the date of the suit: *Ibid.*

HAZARIMAL v. NAMDEV, J. L. R. 32 Bom. 379.  
*C. P. C., sec. 294.*

In granting permission to bid under sec. 294, C. P. C., the Court may impose a term that there should not be a set off from the decretal amount.

GANGARAM v. NAGINDAS, I. L. R. 32 Bom. 381.  
*C. P. C., sec. 11—Right of suit.*

According to sec. 11, C. P. C., a Court has juris-

diction to try every suit of a civil nature but no suit lies at the instance of a creditor where the effect of the decree would be to entitle the Plaintiff to have the property of the debtor (who is a living person) distributed against the wishes of his other creditors.

JANARDON *v.* ANANT, I. L. R. 32 Bom 386. *Interpretation of deed.*

In the interpretation of a deed the literal sense is not to be so much regarded as the real meaning of the parties which the transaction discloses.

BHURABHAI *v.* BAI RUXMANI, I. L. R. 32 Bom 394. *Suit for dowry—Limitation Act, sec. 10—Provincial Small Cause Courts Act, Sch. II, Art. 18.*

In a suit by a husband and a wife for recovery of dowry which was deposited by the former's father with the latter's father, held that this was a suit relating to a trust within the meaning of Art. 18 of Sch. II of the Provincial Small Cause Courts Act and that a second appeal was therefore competent and that sec. 10 of the Limitation Act was applicable to such a suit.

SHIDAPA *v.* VENKAJI, I. L. R. 32 Bom 404. *C. P. C., sec. 311—Limitation Act, Sch. II, Art. 18.*

Where in a proceeding under sec. 335, C. P. C., a minor was not properly represented, a suit at his instance after one year from the date of the order was not barred and Art. 11 of Sch. II of the Limitation Act had no application.

JANGHUBAI *v.* JETHA, I. L. R. 32 Bom 409. *Stridhan—Succession—Mitakshara.*

Where there was a dispute as to succession to the *Stridhan* of an unmarried female, held that her father's mother's sister was entitled to succeed to the exclusion of her maternal grandmother.

MANUEL *v.* JNANA, I. L. R. 31 Mad. 187. *Succession Act, sec. 50—Will—English Law.*

If in a will any other document then actually written is referred to as expressing any part of the testator's intentions, it may be treated as a part of the will.

According to English Law "if an individual on his death bed or at any other time, is persuaded by his heir-at-law, or his next-of-kin, to abstain from making a will, or if the same individual, having made a will, communicates the disposition to the person on the face of the will benefited by that disposition, but at the same time says to that individual that he has a purpose to answer which he has not expressed in the will, but which he relies on the donee to carry into effect and the donee assents to it either expressly or by any mode of action which the donee knows must give the testator the impression and belief that he fully assents to the request, then undoubtedly the

heir-at-law in the one case and the donee in the other will be converted into trustees simply on the ground that an individual shall not be benefited by his own personal fraud."

ASAN CANI *v.* SOMA, SUNDERAM, I. L. R. 31 Mad. 206. *Partnership.*

The English rule as to the incapacity of a partner to give a legal mortgage of partnership property cannot be applied with the same strictness in this country. A partner in India can mortgage partnership property by deposit of title-deeds and he can effect a legal mortgage as well.

Where partners have each the sole management of one branch, each has the power of dealing with the partnership property, and has power to borrow.

MIYAJI *v.* SHEIK AHMED, I. L. R. 31 Mad. 212. *Religious Endowment Acts—Removal of trustee.*

Under sec. 14 of the Religious Endowments Act the Court may direct the removal of the trustee. So long as he is in possession he will be treated as a trustee liable to render accounts. When he is discharged it is necessary to direct surrender of possession.

SHAMA *v.* ABDUL, I. L. R. 31 Mad. 215. *Transfer of Property Act, sec. 59—Attestation.*

Under sec. 59 of the Transfer of Property Act a person subscribing his name as a witness is not a competent witness if he was not present at the execution of the deed but signed his name on the acknowledgment of the signature by the executant.

RAMAN *v.* GOPALACHARI, I. L. R. 31 Mad. 223. *Cause of action.*

Where a note of hand was executed in one place and the creditor resided in another place and the document was silent as to where the money was payable, held that it could not be held that the money was impliedly payable at the residence of the creditor.

MUDIYAN *v.* RAMAN, I. L. R. 31 Mad 231. *Limitation Act, Sch. II, Art. 95.*

A suit to recover damages for fraud is governed by Art. 95, Sch. II of the Limitation Act. When it is doubtful at what precise time the fraud became known to the Plaintiffs, the onus is on the Defendants to shew that the suit is out of time. Upon the facts of the case held that it was a suit to recover damages for fraud.

ANNAMALAI *v.* RAMIER, I. L. R. 31 Mad. 234. *Step in aid of execution.*

An application by an assignee of a decree for being recognised as such is a step in aid of execution.

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### REPORTS (See Index.)

THE CHOTA NAGPUR TENANCY ACT (BENG. ACT VI of 1908) recently passed by the Bengal Council contains provisions in many respects similar to those in the Bengal Tenancy Act. We notice that in some respects the people in Chota Nagpur will not labour under the disadvantages which are felt here. By the new Bengal Tenancy Amending Act of 1907 sales in execution of rent decrees can be set aside by deposit of the decretal debt by judgment-debtors alone who are on the record as such. This rule has not been adopted in the Chota Nagpur Act, sec. 212, of which gives right to judgment-debtors as well as other persons having an interest in the property to have the sale set aside by deposit of the decretal debt. We already pointed out while discussing the provisions of the Eastern Bengal and Assam Council Act (No. I of 1908—Bengal Tenancy Amendment Act) that there the rule is the same as prevailed in Bengal before the amendment in 1907. When the law in this respect has remained the same in East Bengal and has also been adopted in Chota Nagpur, there does not seem to be any good reason why the law should be different in Bengal. We see no merit in the change made in Bengal and hope an early opportunity will be taken to bring the law of Bengal into conformity with that of East Bengal on the one hand and Chota Nagpur on the other.

WE HAVE REPORTED IN THIS ISSUE THE JUDGMENTS of Mitra, J., and of Coxe and Sharfuddin, JJ., in the applications for bail which have come to be known as the Midnapore bail cases, *Janani Mullik and others v. The Emperor*, 13 C. W. N. 51, and *Rajah Narendra Lal Khan and others v. The King-Emperor*, 13 C. W. N. 43. The principle on which bail should be granted to under-trial prisoners are discussed from somewhat different standpoints in those two judgments. The

former follows the accepted principles of English law and applies them to provisions of the Code of Criminal Procedure relating to the question of bail. The latter interprets the law independently of English principles by confining its attention to the codified law in India. In the last number of the last volume we explained by reference to the actual wordings of the sections in the Code, that the law as laid down in India is not at all inconsistent with the law as interpreted in England. In the first issue of this year Mr. Monnier after a review of all the leading Indian and English cases on the subject has come to the same conclusion. We have nothing to add to Mr. Monnier's very exhaustive and able article on the subject.

WE MAY, HOWEVER, POINT OUT THAT THE TWO decisions we report to-day fundamentally differ in two very important respects. The former in common with English decisions regard the object of bail to be to ensure the attendance of an accused person to take his trial. The latter, to borrow the expression of Russel, L. C. J., regards the grant or refusal of bail, more or less from a punitive point of view. The next point of difference is, that the former considers the sworn testimony of some person who speaks from his own personal knowledge of events, as essential in raising a sufficient presumption of guilt to justify refusal of bail or remand of prisoner into custody. The latter regards the statement on oath of a police-officer of rank, based though it may be on information and belief, as sufficient for refusal of bail. The result of the trial at Midnapur, where all the accused excepting three have been discharged, shows at any rate how it may work injustice to remand people to custody on such affirmation based on the mere information and belief of a police-officer, no matter of how high a rank. The higher is his rank the less does he or can he see things with his own eyes; he has invariably to rely on informations received. We are disposed to think that a Magistrate would be on surer grounds if he remanded a person to custody at the preliminary stage of the inquiry after inspection of Police diary, because there he has something more tangible to go upon than mere secondhand information and belief. The matters under report show *ex post facto* how very risky it is to rely on such bare statements, though it be on oath of a police-officer, even of superior rank.



SIR LEWIS TUPPER CONTRIBUTES AN ARTICLE IN No. XIX of the New Series of the Journal of the Society of Comparative Legislation on the new Code of Civil Procedure. The object of the article is to explain the method of legislation in India and to give a short history of the process by which this important legislation was carried through. As the materials of this article are chiefly drawn from the published proceedings of the Viceroy's Legislative Council, most of the facts stated there are already familiar to the legal profession in India. The learned writer's observations regarding Dr. Rash Behari Ghose's proposal to make the trustees of public religious or charitable trusts accountable to two or more persons interested in such trusts, is deserving of attention. Sir Lewis Tupper says:

In an earlier stage of the discussions on the Civil Procedure Bill the Hon. Dr. Rashbehari Ghose proposed a clause to enable two or more persons interested to apply, subject to certain formalities, to a Civil Court for an order requiring the trustee of a trust created for public purposes of a charitable or religious nature to supply a detailed account of the receipts and disbursements in connection with the trust property for a period not exceeding three years next preceding the date of the application. The Bill already gave power to the Courts to direct accounts when once a suit had been instituted; but it is not easy to know whether there has been such a breach of trust as could form the solid foundation of a suit until the accounts are available for investigation. Dr. Rashbehari Ghose's clause was circulated as part of the Report of the Hon. Mr. Richards's Select Committee of August 1907; and I am not at all surprised that it elicited a considerable amount of support. Suppose an institution—a kind of monastery—where a public kitchen is kept, doles are given to the poor, travellers are lodged and fed, and worship is performed; before British rule began the lands around had been given in *jagir* by the *raja* of the day to the head of the institution; that is to say, without disturbing occupancy or altering any proprietary title, the Government share of the produce in cash or kind had been alienated in his favour. It would have been understood that he was to use the proceeds for his own support as well as for that of the charity. It happens that the head of the institution becomes corrupted; he is a spendthrift, a drunkard, a debauchee; the proceeds of the *jagir* are squandered, the charity is starved. His own people will not tell tales; the peasants, unless led, will hang back. Certainly those who have the courage and public spirit to attack the evil deserve all possible support. The decision of the Government is to omit the clause from the Code, but to permit Dr. Rashbehari Ghose to introduce a separate Bill to give effect to his views; and his Bill will be published and circulated. At present Government do not commit themselves to approval or disapproval of the proposal. They hold that the question is one for the communities interested and that it has not yet been fully discussed by the leaders of these communities. Here again the decision seems to me to be proper. The local governments will be heard; and they will be able to consider the evidence which their district officers can supply as to the actual facts connected with the management of religious and charitable institutions in different parts of the country. Such evidence could not be collected or digested as a mere part of the preparation of an elaborate and comprehensive measure like the Civil Procedure Code.

IN THE COURSE OF THE SAME ARTICLE SIR LEWIS TUPPER expresses his appreciation of the method adopted in the Code, of regulating the details of

procedure by rules and orders of Court. This, he believes, will enable the different High Courts and Chief Courts to shape the procedure in course of time so as to satisfy "the sense of individual right and of equality before the law" which, he believes, is more or less common to the two great classes—the educated Indians and the peasantry. The learned writer is, however, of opinion that to make the working of the new Code beneficial to the peasantry, district officers must bring the cases of hardship caused by any rules of procedure to the notice of the Rules Committee. But, we doubt, whether any district officers other than District Judges and Subordinate Judges will have a sufficient acquaintance with the working of the Code to make any such suggestions to the Rules Committee.

DISTRICT EXECUTIVE OFFICERS SELDOM GET ANY chance, and take even less trouble, of acquainting themselves with the civil law. Even District and Sessions Judges, under the present system of recruitment, cannot acquire any practical experience of the Civil Procedure Code or any branch of civil law, as they seldom get an opportunity of trying original civil suits during their official career. Under the circumstances, the Rules Committee will have chiefly to rely on the advice and suggestions of Subordinate Judges or leading legal practitioners so far as the mofussil districts are concerned. It follows, therefore, that the Rules Committee will have to look up to the educated Indians for the removal of hardships caused by any rules of procedure to any Indian community. Regarding the proper assimilation of Western ideas, we may say this much on behalf of the educated Indians that the moral ideals that have prevailed amongst them are almost on all fours with those that are being evolved by modern civilization. This being so there is nothing so unique or novel in modern legal or philosophical conceptions that the educated community in India cannot assimilate as their own. Misconceptions regarding their thoughts and ideas in the minds of those who are not well-acquainted with them must be attributed to want of familiarity with the constitution and working of the Indian mind.

THE ANTICIPATION OF THE WORKING OF THE new Code by Sir Lewis Tupper is at least interesting.

As for the new Code of Civil Procedure we may consider two great classes—the educated Indians and the peasantry. I will say nothing here of the defects of Western system of education in India, which stands at least as much in need of reform as the system of education in the British Isles. I will only say that whatever may be the defects of the Western system in India, it will have sufficed to enable those who enter on the legal profession to understand and administer the new Code. Educated Indians will, I think, appreciate it. In their case the change in the past hundred—nay, in the past fifty—years is enormous. They live in a new atmosphere; they are sustained by a novel sort of mental food;

and it is a deliberate under-statement of the case to say that their powers of wholesome assimilation vary greatly. It is the fashion to assert that this alteration of mental condition is confined to the merest fraction of the population; and that the peasantry remain unchanged. It is quite true that those who have partaken of Western learning are few in comparison with the millions of ignorant tillers of the soil. But speaking of my own part of India I may say that it is not quite true that the peasantry are unchanged. A new generation has arisen which remembers less vividly than that which has passed away the deliverance from serious tyranny and habitual plunderings and war. The law Courts are an educational instrument of greater strength and wider operation than the schools and universities. There is a growing sense of individual right and of equality before the law. All the more necessary is it that the peasantry should have confidence that their wants will be met, their feelings sympathetically considered, and their grievances redressed. For these purposes it is the officers possessing district experience who are their guardians and representatives. The working of the new Code, so far as it will tend to the advantage of the peasantry, will depend mainly upon the exertions of officers with district experience who will be members of the Rule Committees, and upon the vigilance of district officers generally who will be able to bring material points to the notice of the Committees. Heretofore district officers have perhaps felt that to urge omissions or simplifications which would tend to restore the practice of early days after annexation, would merely waste their time, because nothing could be done without legislation for the whole of India. That practice, so far as the peasants were concerned, was such as to enable them largely to conduct their own legislation. The case differs materially now that amendments can be made by provincial Committees of provincial experience in Court rules of provincial application. District officers thus have their opportunity. There will be opposition, and to what extent they will use their opportunity remains to be seen. But it is not too much to say that unless district experience is brought to bear on the deliberations of the Rule Committees, the chief advantage of the Bill for the peasantry will be lost.

#### IS A HINDU WIDOW ESTOPPED FROM PROVING THAT SHE HAD NO AUTHORITY TO ADOPT AFTER ADOPTING, REPRESENTING THAT SHE HAD AUTHORITY.

The question how far an adoption made by a Hindu widow on her representation that she had authority from her deceased husband to make the adoption is binding upon the widow when as a matter of fact it appears that the widow had no authority to make the adoption arose for decision in the recent case of *Dharam Kunwar v. Balwant Singh* a report of which appears at p. 568 of the last September issue of the Allahabad Law Journal. In that case the Plaintiff *Dharm Kunwar* adopted the Defendant, *Balwant Singh*, who lived with the widow as the adopted son for a considerable time, was married by the widow and incurred some expenditure in defending his adoption in a suit brought by the reversioners to set aside the adoption. Afterwards a difference arising between the widow and the adopted son, the widow instituted a suit for a declaration that the adoption made by her of the Defendant was invalid in law as she had no authority to make the adoption. The

Allahabad High Court (Stanley, C. J., and Banerjee, J.) held that the widow was estopped by her conduct from questioning the adoption. It was urged on behalf of the Plaintiff that by the fact of the adoption, the Defendant had suffered no loss or detriment so the principle of estoppel did not apply against the widow. But the High Court held that the Defendant had suffered some loss or detriment by the fact of adoption and therefore the adoption could not be repudiated by the widow. It does not appear that their Lordships intended to rule that if there were no loss or detriment to the adopted son by the fact of adoption, the adoption could be repudiated by the widow. When a boy is adopted into a family and brought up there for some years, his severance from that family at that period itself causes inconvenience, hardship or pain to the adopted son, so it might be said that the undoing of the adoption after some time and the consequent restoration of the adopted son to his natural family, even if it be possible, is not without some detriment to the adopted son. Such consideration may alone be sufficient to uphold the bar of estoppel against the person who intends to repudiate an adoption. In the case of *Kanammal v. Verasami* (I. L. R. 15 Mad. 486), the question of detriment to the adopted son was not at all considered material.

The decision of their Lordships of the Allahabad High Court is in accordance with the reported decisions on this point. But there was one point in the case which was not dealt with either in the judgment or in the argument of the case. The question is whether the widow who had no authority to make a legally valid adoption could by her own conduct raise an invalid adoption to the status of a valid adoption. Or in other words, whether an act which was *ultra vires* of the widow could have the qualities and legal effects of a lawful act on the part of the widow by virtue of estoppel against the widow arising from her own conduct. We may make our meaning clear by analogous cases.

For instance, if a minor having no capacity to make a valid contract induces another to enter into a contract with him by misrepresentation of his age, the contract is still invalid, it cannot be regarded as valid against the minor by the principle of estoppel. So if a corporation having no authority to do certain acts, does those acts by untrue representation, still the acts are invalid and this invalidity cannot be cured by estoppel. In Phipson on Evidence, 3rd Edition, p. 605, the law is stated in these words:—"Estoppel of all kinds, however, are subject to one general rule: they cannot override the law of the land. Thus, where writing is required by statute, no estoppel will cure the defect, &c. And the same is true as to incapacity of parties—e.g., a married woman precluded from contracting by reason of coverture, was not estopped by her representation that she was single,



&c. So an infant is not estopped by his representation that he is of full age, &c. . . . Similarly a corporation is not estopped as to acts which are *ultra vires*."

Now the question is whether the principle quoted above will apply to the adoption made by a widow who in fact had no authority from her deceased husband to make the adoption. Could the act of adoption made by the widow which was *ultra vires* of the widow, be made *intra vires* by the plea of estoppel even against her? If that be so, then there will be no absolute necessity for the widow to get authority from her husband to make an adoption. Authority or no authority the widow may make the adoption, bring up the adopted son in the family and then the adoption will become valid by estoppel. If an infant induces A to enter into a contract with him on the false representation that he (the infant) is of age and A believing in the representation and acting upon that belief enters into the contract and subsequently sues the infant on the contract, the infant is not estopped from proving that at the time the contract was made he (the infant) had in fact no capacity to contract. Should it not, on a similar principle, be held that when a widow having no authority from her deceased husband (and therefore having no legal capacity) to make adoption, makes an adoption on the representation that she has the authority and afterwards a suit arises between the widow and the adopted son with respect to the adoption, the widow cannot be estopped from proving that at the time she made the adoption she had no legal capacity to make the adoption. Of course the son so adopted may sue the widow and recover damages for her wrongful act.

The reported decisions, so far as we are aware, do not deal with the aspect of the question we have discussed above but in the case of *Purbati-bayamma v. Ram Krishna Rau*, I. L. R. 18 Mad. 145, his Lordship Shepherd, J., expressed an opinion at p. 146 which seems to lend support to our view. His Lordship observes:—"At first sight it certainly would seem somewhat anomalous to hold that an adoption, invalid according to Hindu Law, may nevertheless become effectual so as to confer on the person concerned the right in the family of a stranger which he could only acquire by a valid adoption. No doubt under certain circumstances the law may raise a presumption in favour of the validity of an adoption as it may in questions of marriage or legitimacy. But the principle contended for goes further than this and is one which I conceive could never be extended to marriage." In this case the question was whether the widow, who adopted the Plaintiff on the representation that she had authority from her husband to make the adoption, was estopped from repudiating the adoption by proving that she had in

fact no authority from her husband to make the adoption.

## Notes of Cases.

### CALCUTTA HIGH COURT.

#### Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before SHARF-UD-DIN and COXE, JJ. CRIMINAL REVISION No. 950 OF 1908. SONAULLAH PALAN, Petitioner v. THE EMPEROR, Opposite Party. 18th September 1908.

*Penal Code (Act XLV of 1860), sec. 211—Complaint—Determination—Criminal Procedure Code (Act V of 1898), sec. 203.*

The Petitioner lodged an information with the president of the *panchayat* on which there was a police investigation with the result that the police reported the information to be false. On the submission of the police-report the Deputy Magistrate called upon the Petitioner to show cause why he should not be prosecuted under sec. 211, I. P. C. The Petitioner accordingly appeared on the 22nd April and showed cause but the Magistrate directed his prosecution. Against this order of the Magistrate this rule was obtained on the ground *inter alia* that the Magistrate had no jurisdiction to order the prosecution of the Petitioner without first disposing of the complaint of the Petitioner. It was contended on behalf of the Petitioner that the application which he had made in showing cause should be regarded as a complaint.

Their Lordships observed:—

"It is contended on the strength of the case of *Shabiram Agarwalla v. Fiban Kamar*, 5 C. W. N. 254, that the application which Sonaullah made on the 22nd April should be treated as a complaint and inasmuch as this complaint has not been dismissed by the Deputy Magistrate under sec. 203, Cr. P. C., that officer had no jurisdiction to call upon him to show cause why he should not be prosecuted under sec. 211, I. P. C.

In the case just quoted, the applicant in showing cause had not only put in a petition in order to exculpate himself but in that petition he had also asked the Magistrate for an enquiry into his complaint, meaning thereby the allegation that he had made to the police in that case. In the case now before us in his application of the 22nd April, Sonaullah nowhere asked the Magistrate to make an inquiry into the matter of his complaint, namely, into the allegations that he had made in his petition on information to the president of the *panchayat*."

*Babu Gobind Chandra Dey Roy* for the Petitioner.

B. C.

*Rule discharged.*

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BURDWAN GROUP.—Mr. Justice Caspersz and Mr. Justice Doss.

CRIMINAL BUSINESS.—Mr. Justice Holmwood and Mr. Justice Ryves.

ORIGINAL SIDE.—Mr. Justice Fletcher and Mr. Justice Chitty will sit singly.

ORIGINAL SIDE APPEALS AND PRIVY COUNCIL MATTERS.—The Chief Justice and Harington and Brett, JJ.

ON MONDAY LAST, SALES OF PUTNI ESTATES under Reg. VIII of 1819 were held all over Bengal by the Collectors in the different districts. The provisions of the Putni Sale Law are very stringent and there are instances when on account of a bad crop, inundation or difficulties in realizing rents, the putnidar is unable to pay the zemindar's rent in time. The law does not give the officer holding the sale any power or discretion to grant an adjournment of the sale. To remove this hardship

we have suggested before in these columns the inclusion in the Putni Sale Law of a provision similar to sec. 310A, C. P. C., or sec. 174, Bengal Tenancy Act, to allow sales to be set aside on deposit of a certain amount of debt and a certain sum as damages within a certain period of the sale. There are one or two other matters which also deserve the attention of the Legislature. One is regarding service of notice. In addition to the ordinary mode of service provision should be made for a further service through the Post office. A summary power should also be given to the Collector to set aside a sale for irregularity and a civil suit should be allowed only on a refusal of the Collector to set aside a sale. This regulation was passed about a century ago and it is but fair that the provisions for setting aside sales as in Act XI of 1859 (the Revenue Sale Law) should also be extended to the case of putni sales.

SYED A. MAJID, LL. D., READ A PAPER AT A meeting of the Society of Comparative Legislation on the much debated question of the validity of family settlements amongst Mahomedans by way of *wakf*. It has been published in the Society's Journal, No. XIX, p. 122. The position which the learned writer seeks to establish is: that a *wakf* is valid when made in favour of one's descendants with ultimate benefaction to the poor or any object of a permanent nature; that the ultimate dedication may be express or implied; that therefore a settlement without any mention of the poor will be valid. In support of it he quotes from various authorities which according to him show that "for family settlements by way of *wakf* from the time of Mahomed down to the present time there is an unbroken chain of evidence to show that this law existed in Arabia, Central Asia, Persia, Afghanistan and India at periods when these countries came successively to share in the advantages of Mahomedan Law."

IN REVIEWING THE ADVERSE DECISIONS OF THE Privy Council on this question, the learned writer states that in *Ahsanullah v. Amarchand*, L. R. 17 I. A. 28, the Judicial Committee showed a correct appreciation of the Mahomedan authorities in so far as they approved of the view of Kemp, J., that the "mere charge upon the profits of the estate

of certain items which must in course of time necessarily cease being confined to one family and which after they lapse will leave the whole property intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahomedan Law." But he takes exception to their Lordships' views in so far as they suggest that there should be a substantial dedication of the property to charitable uses at some period of time or other, in order that the dedication may be valid. The next case *Nizamuddin v. Abdul Gafur*, L. R. 19 A. 170, the writer criticises on the ground that it implies that the ultimate benefaction in favour of charitable objects should be express, whereas in the writer's view, the ultimate benefaction in the case of a *wakf* is as a matter of law always in favour of the poor. It was however in their decision of the case of *Abulfata v. Rasamaya*, L. R. 22 I. A. 87, that the writer thinks the Judicial Committee went wholly contrary to Mahomedan law and remarks that they "disregarded the authorities brought to their notice." It is further suggested that "their Lordships never intended to decide according to the Mahomedan law." The writer then observes that the rule of perpetuities in favour of which their Lordships departed from accepted doctrines of Mahomedan law, itself originated in England not in any broad principle of justice, but was the result of pure accident as the history of that Rule shows, and that it is inexpedient to introduce it in India.

SIR ROLAND WILSON, WHO JOINED IN THE discussion which followed, agreed with Mr. Ameer Ali in his view of the Privy Council decisions invalidating family settlements by way of *wakf* that they were not in accordance with Mahomedan law. He said he had been convinced by the argument of Mr. Ameer Ali in his work on Mahomedan law that such settlements had been regarded as valid by all schools at least as far back as the date of the Hedaya, if not several centuries earlier. But he did not think it likely that the Prophet had been either aware of the practice or sanctioned it or that it was an institution of Pre-Islamic Arabia. Sir Roland, however, regarded the decisions of the Judicial Committee right from the broader point of view of public utility and said that should they be regarded as erroneous from the point of view of Mahomedan law, the view of the Privy Council should be upheld by legislation. In his view the only justification for modifying the views of the Privy Council would be if the majority of the Mahomedan community (the land-owners and the land-less) could be found (by some method of vote-taking) in favour of "subjecting the living to the wishes and caprices of the dead." The determination of such an intricate question of law and

economics by the taking of a plebescite would, in our opinion, be both injudicious and misleading.

SIR RAYMOND WEST, IN CLOSING THE DEBATE said that the question was one of great difficulty and had given rise to considerable difference of opinion even among Mahomedan jurists and it was hardly to be wondered at that the decisions of English judges on such a question should be questioned by representative men of the Mahomedan community of India. He showed that the same clashing of principles and decisions had taken place in French Algeria. He also had doubts whether Mahomed could be said to have recognised in the sacred rules of family succession a system of dedication by which property could be tied up in mortmain for a long series of generations. He mentions that even Mahomedan rulers of the highest integrity were embarrassed by finding a large proportion of land placed *extra commercium* and exempted from fiscal contribution by the sacred impress of dedication. We think, to allow any community in India to revive such a system of dedication will promote further indolence among the landed classes, to say nothing of the other evils that will follow, and on this ground alone, such settlements should be discouraged.

SIR R. WEST MAINTAINS THAT THE JUDICIAL Committee on purely Mahomedan principles might have ruled as they have done. Sir Raymond, however, admits that the doctrine of unlawfulness of perpetuities is not congenial to the Mahomedan community and, therefore, he concludes by suggesting the adoption of a modified form of entail limiting the right of disposition to two or three generations and thinks that this will be acceptable to our Mahomedan fellow subjects as a reasonable compromise between tradition and public policy. But Sir Raymond is, perhaps, unaware of the fact that the Settled Estates Act (Bengal Council Act No. III of 1904) has already provided such a limited form of entail both for the Hindu and Mahomedan land-owners of Bengal. Nawab Salimulla of Dacca was a member of the Bengal Council at the time when this Act was passed through Council and he supported the measure in the interest of the Mahomedan community. If it is thought expedient or desirable, the provisions of this Act may be extended to other provinces. The Act has been in force for four years. But not a single Mahomedan estate has yet been settled under the Act and only one Hindu estate has been so far settled. The inevitable conclusion from such facts is that from an abstract discussion of the doctrines of Hindu or Mahomedan law we can seldom realize the real sentiments of the people in respect of ancient institutions, now that their ideas

have considerably changed. We predicted that the Settled Estates Act would remain a dead letter and it has practically remained so. At any rate this attempted revival of limited entail on this side of India has not met with sufficient encouragement to justify the enactment of a similar measure either for the Hindu or the Mahomedan community in other parts or for the whole of India.

WE SEEM TO BE ON THE BRINK OF A PERIOD OF panic legislation. We are at one with His Excellency the Viceroy in his view that the murderous deeds of misguided fanatics should not be allowed to blacken the reputation of a whole people. It is, no doubt, desirable to dig out noxious weeds. But is it necessary to forge special weapons for it? Is not the ordinary law of the country sufficient for the purpose? Our view is that the existing law of procedure or the substantive law of crime in this country is not at all at fault. It is only the Police method of prosecuting political cases that is chiefly responsible for undue prolongation of such trials. In the recent jail murder case the whole proceedings, commencing with the preliminary magisterial enquiry, and terminating in a jury trial, were concluded within the remarkably short period of nine days. This shows that the ordinary procedure of criminal law is capable of rapid execution. We do not consider it either expedient or necessary to forge any extraordinary procedure for the extirpation of stray and sporadic cases of political crime in this country. All that is required is increased Police vigilance and expedition in bringing those against whom sufficient evidence is obtained to speedy trial and less waste of public time and patience by beating about the bush in the expectation of evidence turning up against others. What is wanted in this country is increased detective ability in the Police and any shortcomings in this respect cannot be made good by any number of Crimes Acts or approvers' stories.

THE GOVERNMENT OF INDIA IS BEING GIVEN A LOT of amateur advice by the *London Times* and its echoes in this country for doing away with the system of jury trial and some wholesome and fundamental rules of the law of evidence. We do not see much wisdom in such suggestions. To accuse a person of political offence is not the same as finding him guilty of it. It is not shown also that trial by jury or a trial according to law has resulted in failure of justice in any recent political case. The advisers also lose sight of the fact that jury trials in this country exist only in approved areas. That barring the Presidency towns, the law does not attach any finality to the verdict of the jury. That even in the High Court Criminal Sessions the judges are not bound to accept a verdict by a

narrow majority. That on the Appellate Side, the High Court Judges are free to set aside even an unanimous verdict of the jury on a reference from the District and Sessions Judge. That for treasonable conspiracy the law does not provide for jury trial except in the High Court Sessions. Under the circumstances the forging of any special procedure for the summary trial of political offences and the taking away of the right of appeal is bound to create an impression in the public mind that persons charged with political offences are not to have a fair trial. The creation of any such impression is likely to shake the confidence of the people in British justice, which would be unwelcome and impolitic even from the administrative point of view. It has always been the pride of the British constitution and the law Courts that all offenders are thereunder treated alike. The confidence of the people on the British law Courts is a more valuable asset for the maintenance of the peace and order and, above all, the good will of the people than any number of strong measures and laws for securing the same end.

THE FOLLOWING OBSERVATIONS IN THE LAST number of the *English Law Journal* show how the suggestion of a special tribunal or special laws for the trial of political offenders is opposed to the spirit of the British constitution and repugnant to British ideas of justice and fair trial.

The equality of all men—and women—before the law of England has seldom been more signally illustrated than by the recent proceedings in the suffragist agitation. A meeting was held, at which women were incited to rush the House of Commons. The speakers were not interrupted, but the promoters of the meeting were summoned for inciting to a breach of the peace; they were brought before a Magistrate, they were allowed to call as witness members of the Government, and, finally, they were ordered to be bound over or to go to prison for a short term. And those women who, at their suggestion, committed acts of violence were likewise brought before a Magistrate and received a similar sentence. But throughout there was not the slightest attempt either to proceed against the agitators, before any special tribunal for any special political offence, or to claim any special privilege or protection for political officials. It seems to us, indeed, a matter of course that things should be so, and that the Administration should have exactly the same rights and the same liabilities in its relation with the citizens as any one citizen has in his or her relations with another. Yet how differently the affair might have been treated if it had happened in France! There they have a special code—*Le Droit Administratif*—which regulates the relations of the Government and the individual upon principles quite different from those which fix the legal rights and duties of citizens towards one another, which has its special Courts and its special law, both subject to political influences, and which gives Ministers and officials special privileges and powers against private persons. It shows an extraordinary disregard of the spirit of our Constitution that some of the leaders of the suffragist movement are anxious to be proceeded against as political prisoners for political offences, and think it a hardship that they should be made subject to the ordinary law. Such a course would make the work of the Government much easier, but it would

cut at the roots of the liberty of the individual citizen. In England there can be no offence save against the law of the land, and no punishment save that directed by the law of the land. The Magistrates may, it is true, in their discretion or upon advice, relax the full severity of the law; but that surely is no hardship. And that is the extent to which the Administration can influence the arbitrary working of the Courts; it may reduce sentences, but it cannot impose them.

### SIR BHASHYAM AIYANGER.

In the death of Sir Bhashyam Aiyanger, India loses a most erudite jurist and a remarkably sound lawyer of the present time. It may be that there are more brilliant lawyers amongst us but in scholarship and in the comprehensive grasp of principles going hand in hand with a mastery of the technique and the details of every branch of the law that a lawyer has to deal with in India, it is no exaggeration to say, that he had no equal. As a man he was a recluse and so destitute of sentiments and emotions that he seldom took any interest in any questions outside the daily practice and study of law. This is why he was little known outside the Madras Presidency before he was appointed to officiate as the Advocate-General of Madras in 1897. The highest law offices in India had been the monopoly of the English Bar and this departure in favour of a vakil naturally met with strong opposition from the members of that Bar all over India. We are, however, always in favour of merit and opposed to monopoly and welcomed his appointment. The Government had on many occasions sought the advice of this eminent lawyer and come to prize it accordingly till they could get a good man from England for this high office. Sir Bhashyam continued to officiate as the Advocate-General. After officiating for a year he made over his charge to Sir (then Mr.) Arnold White. When Sir Arnold White was made Chief Justice of the Madras High Court in September 1899, Sir Bhashyam again officiated as Advocate-General. In 1901 Sir Bhashyam Aiyanger was raised to the Bench. As a judge his reputation soon spread far and wide through his erudite, sound and masterly judgments. His judgments, though learned, seldom displayed any effort on his part to show off his learning. They were never irrelevant to the issues at the trial. His interpretations of the law dealing as they did with fundamental principles were not confined within the narrow limits of the cases before him. But even his *obiter dicta* were seldom beside the point and were always instructive and full of suggestions. During the three years that he was on the Bench he has left the Law Reports richer and his decisions have already come to be regarded as legal classics. In 1904 he had to retire under the 60 years' rule. Like Sir Subramania Aiyar, he was a self-made man. He had early in life refused a Sub-Registrarship and

worked his way to the Bench by his own exertions and ability. He was knighted before being raised to the Bench and presented with a *jaagir* for life on his retirement. Before this he had been made a Rai Bahadur in 1887 and a Dewan Bahadur and C. I. E. in 1895. On his retirement from the Bench he resumed practice at the Bar. As no other Indian Judge had done so before, his reversion to the Bar met with some amount of public criticism. But as we have said before, Sir Bhashyam was a most unemotional man and one of those practical men who cannot live without work. It is therefore very sad, though not surprising, that he was suddenly taken ill after arguing an important point of law, was carried away unconscious from the Court and died of cerebral hemorrhage. Sir Arnold White in paying a fitting tribute to his memory truly said that his death removes a landmark in India which cannot be replaced.

We cannot possibly do justice to the many important decisions passed by him during his short but active judicial career. We mention here only a few of the more striking of his judicial pronouncements. In *Bell v. The Municipal Commissioner of the City of Madras*, I. L. R. 25 Mad. 457 his decision on the question of the liability of Government under taxing Acts constitutes an important contribution to Indian Constitutional Law. In *S. Sundaram Ayyar v. The Municipal Council of the City of Madras*, I. L. R. 25 Mad. 635, he discussed in a masterly manner the question of the respective rights of Municipalities and private individuals in "streets" under varying circumstances of dedication and grant. His dissenting judgment in *Raf-namasari v. Akilandammal*, I. L. R. 26 Mad. 291 is considered by some of the soundest lawyers in this as well as in other provinces as containing the most convincing and correct exposition of the true scope of Arts. 118 and 119 of the Limitation Act in connection with suits involving issues concerning the validity or otherwise of an alleged adoption. So also, his decision in *Rajah of Vizianagram v. Raja Setrucherla*, I. L. R. 26 Mad. 686, dissenting from the view held in common by all the High Courts, will, it is believed, prevail, should the question come up for consideration before the Privy Council. In that case Sir Bhashyam holds that one of several co-sharers paying the whole revenue to save, and thus actually saving, the estate from sale acquires a charge over the shares of his co-sharers in regard to the amounts properly payable by them. But the decisions, which appear to have created considerable stir in the Province, are the cases of *Madathapa v. Secretary of State*, I. L. R. 27 Mad. 386 and *Vidyapurna v. Vidyavidhi*, I. L. R. 27 Mad. 435, in the former of which the practice of revenue officials in Madras of levying penal assessments on trespassers on Government land was declared by him as also by

two other Judges (Subramania Aiyer and Boddam, JJ.) to be illegal. In the latter case Sir Bhashyam as also Sir Subramania Aiyer, JJ. have put forward certain views regarding the powers of mohunts of temples in respect of the management of temple property—which if historically sound have certainly been lost sight of for a considerable length of time. His unemotional nature, however, made Sir Bhashyam Aiyanger a rather severe criminal Judge. Of this the case of *Ramaswami Gounder v. Emperor*, I. L. R. 27 Mad. 271 may be regarded as an illustration. The question in that case was whether the accused in a murder trial could be convicted on the testimony of a person who it was alleged by the defence, on the case sought to be made out, to be an accomplice. Subramania Aiyer, J. although demurring from this view of the law maintained that the conduct of the deceased, who was formerly kept mistress of the accused, in worrying and blackmailing the latter after his marriage and threatening to publicly disgrace him before his relations on a ceremonial occasion, constituted such provocation as would justify the commutation of the death sentence passed by the Sessions Judge into one of transportation for life. Boddam, J., on the other hand, rejected the evidence altogether and was for acquitting the accused. On the case being referred to Sir Bhashyam, he agreed with Sir Subramania Aiyer on the question of law but went out of his way to hold that the facts stated did not constitute any extenuating circumstance for which the accused deserved mercy and sentenced him to be hanged.

### Notes of Cases.

#### ENGLISH LAW COURTS

##### PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD MACNAGHTEN.

LORD ATKINSON.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.  
1908.

27, October,

FATEH CHAND, Petitioner,

v.

RANI KISHUN KUNWAR,  
Respondent.

*Special leave to appeal to Privy Council—Matter indirectly involving amount exceeding appealable value—Question of general interest.*

Application for special leave to appeal from a judgment of the High Court of Allahabad. It appears that there was a village called Rampur, which, although nominally a village, was really a town, and, by reason of the provisions of Act XX of 1886 being applied to it, removed from all those laws which deal with the law of landlords and tenants *inter se*. In this village there were a large number of houses and about 4,000 inhabitants. The

Respondent to the present application was recorded in the revenue papers as the zemindar of the town of Rampur. The Petitioner was the owner of a large number of houses and grove lands situated in the town. He purchased the property in suit, that is, four houses and two groves, but his possession was interfered with by the Respondent on the ground that he was not the proprietor of either the houses or of the groves, but was purely and simply a tenant: that the zemindar had a right to assess rents upon both the sites of the houses and upon the grove land. At the last settlement of the North Western Provinces, in the year 1872 in regard to the houses it was recorded that the persons who were occupiers of the houses were the owners of the houses, and the Petitioner claimed title as owner and not as tenant, that is, as owner against the zemindar without any right of the zemindar to assess rent upon them. In regard to the groves it appears that there was a dispute as to the exact nature of the title in those groves, which was settled as between the zemindar and the owners of the groves—by which it was agreed that although the owners of the groves should be treated as proprietors they should be entered in the Registers not as the *khewal*, but that the *khewal* should remain in the zemindar, and in a separate column the occupiers of the grove should be recorded as actual proprietors of those groves. The whole of the village appears to have been revenue-free, but the Government stepped in and said they proposed to assess revenue on the village, which was payable direct by the occupier to the Government. In those proceedings the Government decided that if it were possible to shew a clear title of 50 years no revenue would be assessed, but where the occupation had been for a period less than 50 years revenue would be assessed, and the result was that in regard to two of these houses out of four revenue was assessed on them, and in regard to the other two revenue was not assessed because there had been a continuous occupation for a period exceeding 50 years. In pursuance of that there was a cess also assessed upon two of these houses which the Petitioner paid. The view taken by the Munsif, who first tried the action, was that the Petitioner was a tenant, and consequently the recorded zemindar could assess rent upon him both for the houses and for the groves. The Subordinate Judge came to the conclusion that there was no doubt that the result of the proceedings, coupled with the whole series of transactions, shewed that the occupiers of the houses in Rampur were not tenants, but were actually proprietors and owners of property. The High Court, treating it as a question of law, said that the proceedings were erroneous, and restored the decree of the Munsif. The property in suit in the present action was only valued at 800 rupees.

*Mr. DeGruyther, K. C.*, for the Petitioner after stating the facts as above, submitted that in the circumstances of the case special leave to appeal ought to be granted.

[LORD MACNAGHTEN.—It seems to me that the decree against which you wish to appeal is nearly two years old?]

*Mr. DeGruyther.*—First of all we applied to the High Court within six months for leave to appeal, which was refused. The petition lodged before your Lordships' Board stood over from last sittings because of the pressure of business before your Lordships. The High Court decree was dated 7th November 1906. The question I ask your Lordships to consider is this. The effect of the judgment of the High Court is to state that the settlement proceedings did not operate to confer upon any occupier of a house in this town of Rampur the proprietary right. Now that will of course affect all the occupiers of houses in the town of Rampur, and all the occupiers of the groves the town of Rampur. It affects us, according to our affidavit, in regard to other property to the extent of 20,000 rupees. I would ask your Lordships to consider whether expense would not really be saved by granting leave. There is no question that we could now bring an action in the Court of the Subordinate Judge of Indra in regard to the whole of the property in our possession for the purpose of obtaining a declaration of our title. It is equally certain that the Subordinate Judge before whom we went would at once dismiss our action upon the order and the view taken by High Court of these settlement proceedings. It is more than likely the High Court would re-affirm on appeal its original view, namely, that we were tenants and not proprietors. In that case there is no doubt we should have an appeal as of right to your Lordships' Board as against this very Respondent, who is the zemindar. There would be no further evidence. Everything turns on the settlement proceedings. In that case I submit we would only be put to the expense of a new action for the purpose of determining the title, and no possible advantage would be gained, because your Lordships would have the same record. The matter is one affecting not only us but every occupier of a grove and of a house in this town, which is said to have 4,000 inhabitants, so that the matter is one of considerable general importance.

[LORD MACNAGHTEN.—The date is 17th November 1906.]

*Mr. DeGruyther.*—That is the judgment. Then we are given six months under the Code to apply to the High Court. Then we applied to the High Court within the six months.

[LORD MACNAGHTEN.—I dare say you took as long a time as you could.]

*Mr. DeGruyther.*—My trouble in regard to that particular matter is this. I have a certified copy

of the petition asking for special leave and a certified copy of the order, but neither of these gives the date upon which the order was made. I submit it is quite clear that we were allowed six months under the code to apply for leave, and in the ordinary course of events a certain amount of time would be occupied before the other side had notice and our application would come up for hearing.

[LORD MACNAGHTEN.—Where is the six months referred to?]

*Mr. DeGruyther.*—Under sec. 598. It may possibly be in the application section of the Indian Limitation Act. There is no doubt we are allowed six months from the date of the decree within which to apply to the High Court for leave to appeal to His Majesty in Council.

[SIR ANDREW SCOBLE.—You cannot give us the date on which leave was refused by the High Court, can you? That is an omission of a most important date.]

*Mr. DeGruyther.*—Your Lordship will find the order at the end of that. (Handing a paper to his Lordship.)

[SIR ANDREW SCOBLE.—There is no date.]

*Mr. DeGruyther.*—The matter raised on this petition really involves the determination of the effect of the settlement of 1862 *qua* all occupiers of houses and all occupiers of grove lands in these towns. The matter is of considerable importance not only to us but to the general community.

[LORD MACNAGHTEN.—You say you have other property in the same condition.]

*Mr. DeGruyther.*—We do.

[LORD MACNAGHTEN.—Is that proved?]

*Mr. DeGruyther.*—By affidavit—the affidavit of our client in the High Court. The order is this. "In this case we are unable to certify that the application for leave to appeal to His Majesty in Council is a fit one for a certificate." I find that the matter has been considered by various High Courts and even by your Lordships, and in regard to the six months it has been held that the power exists in the High Court to enlarge even that period of six months for cause shown.

[SIR ARTHUR WILSON.—There is a period of 30 days fixed under sec. 599. Then the Act of 1888 struck out these words simply.]

*Mr. DeGruyther.*—I think the reason may have been, it was in the Limitation Act, I did not think of looking the point up, but I am certain that the period is six months in the ordinary practice from the date of the decree. There are many cases about it. It has been held that the six months were exclusive of the date on which the decree was presented and dated. There seems to be a very large amount of authority about it. I think there is no doubt, if your Lordships would allow me to say so, that the period is six months. I ad-



mit I did not look it up. I am sorry I cannot lay the precise section before your Lordships.

[LORD MACNAGHTEN.—It seems to me six months. I suppose you took your full time.]

Mr. DeGruyther.—Very likely.

(Counsel and parties were directed to withdraw and their Lordships deliberated. Counsel and parties being called in.)

[LORD MACNAGHTEN.—Mr. DeGruyther, their Lordships will grant your application. You must be put upon terms to deposit security within a reasonably short time, say four months.]

Mr. DeGruyther.—To deposit security?

[LORD MACNAGHTEN.—Yes. Nobody appears on the other side?]

Mr. DeGruyther.—No.

[LORD MACNAGHTEN.—The costs will not be costs in the cause in any event.]

Mr. DeGruyther.—Not any costs?

[LORD MACNAGHTEN.—Not the costs of this application.]

Mr. DeGruyther.—I think, if your Lordships so desire, my clients could be put on terms that they should proceed with the case within a certain time after the arrival of the record.

[LORD MACNAGHTEN.—Certainly. What time?]

Mr. DeGruyther.—I think there is no objection that my clients should lodge a case within two months of the arrival of the record. It seems to me it is a matter in which your Lordships are shewing indulgence, and my client, if he wishes to protect his proprietary interests, might do so on the first available opportunity.

[LORD MACNAGHTEN.—That being so, and on those undertakings their Lordships will humbly advise His Majesty to grant special leave.]

J. H. W. A.

Leave granted.

## CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before MITRA and CHITTY, JJ. CIVIL RULE No. 2872 OF 1908. RAJENDRA LAL GOSWAMI, Petitioner v. HIRA LAL BAG. 12th November 1908.

Rent suit—Non-compliance with Court's order to file correct descriptions of land in the copies of plaint—Jurisdiction.

Plaintiff brought a suit for rent on the 27th April 1908 in the Court of the Munsif of Ranaghat. The Court ordered the plaint to be registered and fixed the 28th May for final disposal and ordered the Plaintiff to put in copies of summons within two days. The Plaintiff put in the copies in time. On the 6th May the Court ordered the Plaintiff to file correct description of the boundaries of the land as the description given in the copies

of the plaint was incorrect. The Plaintiff applied for 15 days' time to do so. The Court rejected the application and ordered the Plaintiff to file the description on the next day ("by to morrow.") The Plaintiff having failed to comply, the Court dismissed the suit on the 12th of May i.e., long before the date fixed for the hearing of the case. The Plaintiff appealed to the District Judge who held that no appeal lay, although he expressed an opinion that the order of the Munsif was wrong.

Baboo Shib Chandra Palit for the Petitioner contended that the Court had no jurisdiction to dismiss the suit as the Code does not provide for the dismissal of a suit for non-compliance with the order for filing correct descriptions of the boundaries of the land and that at all events the suit could not be dismissed before the date fixed for hearing.

Held—That the order of the Munsif was bad.

S. C. S. Case sent back for final disposal.

CIVIL APPELLATE JURISDICTION. Before MITRA and CHITTY, JJ. CIVIL RULE No. 2999 OF 1908. PRAMATHA NATH SAHA, Plaintiff, Petitioner v. BASER FAKIR AND OTHERS, Defendants, Opposite Party. 12th November 1908.

Provincial Small Cause Courts Act (IX of 1887), sec. 23.—Suit involving question of title.

The Petitioner brought a suit in the Court of Small Causes at Goalunda against the opposite party for recovery of Rs. 40 as damages for cutting and appropriating a jack tree. The Defendant pleaded a permanent tenancy and a right to the trees standing in the land. The Small Cause Court Judge (the Munsif exercising such powers) held that he had no jurisdiction to try the suit as it involved a question of title and dismissed it.

Held—That the lower Court ought to have either tried the case or returned the plaint for presentation to the proper Court under sec. 23 of the Small Cause Court and that the order of dismissal was wrong.

Baboo Shib Chandra Palit for the Petitioner.

Baboo Devendra Nath Bagchi, for the Opposite Party.

S. C. P.

Rule made absolute.

CIVIL APPELLATE JURISDICTION. Before CASPERSZ and COKE, JJ. APPEAL FROM ORIGINAL ORDER No. 38 OF 1907. RAM LOCHAN SINGH AND OTHERS, Plaintiffs, Appellants v. MAHARANI BENI PERSHAD KOERI, Defendant, Respondent. 9th November 1908.

Civil Procedure Code (XIV of 1882), sec. 492 (a).—Decree of Revenue Court, transferred to Civil Court for execution, if decree within sec. 492 (a).



On the 30th April 1897, the Defendant obtained an *ex parte* decree under sec. 93 of the North Western Provinces Rent Act (XII of 1881). That decree was executed, and one of the execution cases was pending in the District of Sarun where the decree of the Balia Revenue Court had been sent for execution under the provisions of the Civil Procedure Code. Satisfaction not having been obtained, execution was next taken in Bhagalpur, also, in the terms of the Code of Civil Procedure and the decree-holder attached some land situated in that district.

Thereupon the Plaintiffs who represented the original judgment-debtor instituted a suit in the Court of the Subordinate Judge of Bhagalpur and applied for a temporary injunction to stay the sale in the execution case then pending and arising out of the original *ex parte* decree of 1897. The Subordinate Judge granted an *ad interim* injunction. Afterwards he disposed of the application under sec. 492, C. P. C., and held that the decree contemplated by cl. (a), sec. 492, C. P. C., means a Civil Court decree, and that as the decree in the present case was a decree of a Revenue Court, the sec. 492 did not apply. He followed *Onkar Singh v. Bhup Singh* (I. L. R. 16 All. 494). In the result, he allowed the objection, refused to issue any injunction, and set aside the *ad interim* injunction.

The Plaintiffs appealed to the High Court.

**Held**—The Revenue Courts are Courts of Civil jurisdiction within the meaning of the Civil Procedure Code, in that their decrees when transferred in the regular course are to be treated in all respects as if they were passed by a Court of Civil judicature.

*Onkar Singh v. Bhup Singh* (I. L. R. 16 All. 494) dissented from.

*Nilmony Singh Deo v. Tara Nath Mukerji* (I. L. R. 9 Cal. 295) and *Madho Prakash Singh v. Munli Manohar* (I. L. R. 5 All. 496) referred to.

*Babu Jages Chunder Roy* for the Appellants.

*Babu Ram Charan Mitter* for the Respondent.

A. T. M.

*Appeal allowed.*

**CIVIL APPELLATE JURISDICTION.** Before STEPHEN and DOSS, JJ. APPEAL FROM APPELLATE ORDER No. 19 OF 1908. SOUDAMINI DASSI, decree-holder, Appellant *v.* BAIKANTA NATH SEN, AND OTHERS, Judgment-debtors, Respondents. 16th November 1908.

**Art. 179 (4), Limitation Act—Application for substitution and issue of notice under sec. 248, C. P. C.—Step in aid of execution.**

Harnath Talukdar, obtained a decree against the heirs of Goya Nath Sen, his debtor, on the 4th June 1901 and the decree directed the money to be realized from the assets of the deceased in the hands of his heirs. The decree-holder died leaving

a Will by which his widow was appointed sole executrix. The widow however without obtaining probate applied on the 30th May 1904 for execution of the decree as next friend of her minor sons. The application stated that the names of the heirs of the deceased decree-holder be substituted and after notice under sec. 248, C. P. C., is issued the money be realised by arrest of the judgment-debtors. The Court ordered the applicant to produce succession certificate which was not done and the case was dismissed for default. The 2nd application was made on the 15th March 1907 by the widow after the grant of probate to her as executrix. The judgment-debtors objected *inter alia* that the decree was barred as the application of the 30th May 1904 was null and void. The 1st Court overruled the objection but the District Judge on appeal allowed the same and held that the decree was barred. The decree-holder appealed to the High Court and it was urged on her behalf that the application of 1904 was a step in aid of execution under Art. 179, cl. 4, Limitation Act although there were some irregularities in the same. I. L. R. 25 Cal. 594, 24 Cal. 778. For the Respondent it was urged that the substantial prayer in the petition of 1904 was the arrest of the judgment-debtors which was against the terms of the decree and the Court could not have granted the same and the application was null and void. I. L. R. 12 All. 64, I. L. R. 13 Bom. 237, I. L. R. 22 Cal. 827. The widow of Harnath was the executrix under the Will and the property vested in her upon the testator's death and she did not renounce her position as such but in the application of 1904 she applied as next friend of her sons and the prayer for substitution was illegal and invalid and it was the duty of Court and not of the parties to issue notice (I. L. R. 29 Cal. 580) and in the case in I. L. R. 25 Cal. 594 notice was actually issued under 248 while in the present case no notice was served or ordered to have been served.

**Held**—The application of the 30th May 1904 was a step in aid of execution inasmuch as in it the heirs of the decree-holder applied for substitution of their name and also for issue of notice under sec. 248, C. P. C.

*Babu Govinda Chundra Dey Roy* for the Appellant.

*Babu Khetra Mohon Sen* for the Respondents.

A. T. M.

*Appeal allowed?*  
*case remanded.*

# THE Calcutta Weekly Notes.

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### REPORTS (See Index.)

WE HAVE BEEN INFORMED THAT SINCE THE ONE anna postal stamp or stamps have come to be used as receipt stamps, many ignorant or ill-informed people refuse to cancel the stamp at the time of granting receipts, in the belief that any thing written on the stamp will make it ineffectual as in the case of postal stamps. The revenue authorities on the discovery of an uncanceled stamp on a receipt impose penalty on the person granting it. A peon, durwan or sarkar who is ordinarily entrusted with the posting of letters and collection of bills on his master's behalf, in ignorance of the difference in the rules in the postal and revenue departments in this respect, not unfrequently follow the uniform practice of leaving the stamps blank. It is very hard in such cases to make them or their masters pay penalty to the revenue authorities for such *bona fide* errors. We would suggest therefore that the revenue authorities should publish notices in vernacular and circulate them through the collectorates in the mofussil towns and sub-divisions as widely as possible that postal stamps when used for granting receipts must be cancelled, mentioning also the penalty for non-cancellation and pointing out that their non-cancellation on receipts lead to their removal and misuse by unscrupulous persons. If a number of such notices are made over to revenue agents and mukhtears for circulation amongst the people at large, the ignorance in this respect in the popular mind will to a great extent be removed and cases of hardship will also be less frequent.

WE PUBLISH ELSEWHERE A CODE OF ETHICS recently framed and adopted by the American Bar Association for the guidance of the members of the legal profession in America. In this country the Legal Practitioners Act embodies disciplinary provisions for the maintenance of a high professional standard amongst the different classes of legal practitioners who come under the provisions of the Act. This Act provides penalty for unprofessional conduct but is silent as to what amounts to professional misconduct. There are no rules of conduct framed either by the High Courts or by the members of the legal profession in India to guide the profession as to what amounts to unprofessional conduct and much less professional propriety. No definite rules of conduct have also been framed by the English Bar up to the present time for the guidance of the legal profession. The Bar Council in England, which has come into existence in recent years, only give their opinions on such matters of professional etiquette as may be referred to them from time to time. We welcome therefore the canons of ethics framed by a strong committee of the American Bar. The members of the profession in this country will find these rules of professional ethics useful so long as the legal profession in this country or the Bar Council in England do not undertake a similar task. Moral laws and ideas are very much the same all over the world and we are sure that lawyers in this country will find that the American Code of Ethics is not very different from their own ideas of professional propriety.

OUR LONDON CONTEMPORARY OF THE *Law Journal* considers it a very significant fact that the Indian students at the Inns of Court should have offered themselves in such large numbers and acquitted themselves creditably in the examination in constitutional law and legal history. Our contemporary very sympathetically observes that knowledge in these particular branches of the law will come serviceable to them in view of the constitutional changes that are likely to take place in India in the near future. We hope that there is some solid foundation for our contemporary's expectations. The increasing number of Indian students who have been qualifying themselves for the Bar in England is also sure to

strengthen the constitutional forces in the country. Sir Edward Clarke in his speech at the dinner, given to Mr. Asquith very truly observed that a lawyer may be a Radical but he is never a Revolutionary. Both in England and in America, we have noticed recently, the lawyers are in increasing numbers being entrusted with positions of responsibility and trust in the affairs of the State. A lawyer has a greater insight into human nature and knowledge of human affairs than members of any other profession and to this must be attributed the growth of their political power in the world. The past history of the United States, says our contemporary, illustrates, as does no other history save that of the ancient Athenian democracy, the immense influence for good which the legal mind has exercised upon the development of a people. Hamilton, Jefferson, Adams, Monroe and Lincoln, these are the men who have moulded the destinies of the United States.

THE PASSAGE IN THE *Law Journal* ABOVE referred to runs as follows :—

In the latest examination lists issued by the Council of Legal Education the number of Oriental names is exceptionally large. Fifteen Indian students, six belonging to Lincoln's Inn, five to Gray's Inn and four to the Middle Temple, may be counted among the sixty-nine successful candidates at the Final Examination. Far more striking is the large measure of success the Indian students attained in the Constitutional Law and Legal History Examination. Of the one hundred and seven candidates who passed the examination, no fewer than three were, or nearly one-third, Indian names. There is no subject in which, having regard to the present condition of India and to the larger part which the native population is to play in its government, the success of the Indian students could be so welcome or appropriate.

THE QUESTION HOW FAR AN ORDER UNDER SEC. 145 (b), Cr. P. C., precludes the party against whom it operates from bringing a possessory suit under sec. 9 of the Specific Relief Act came up for decision in the case of *L. Moore v. Monwanjan Guha*, 12 C. W. N. 696. The same question also arose in the case of *Jwala v. Ganga Prasad*, I. L. R. 31 All. 331. In the Calcutta case it was held that when an order under sec. 145 (b) had been passed against a party to the proceeding, that party could not maintain an action for recovery of possession under sec. 9 of the Specific Relief Act when the cause of action is stated to be his dispossession in pursuance of the order of the Criminal Court. It was contended on behalf of the Plaintiff that it could not be said that he was dispossessed in due course of law when the dispossession was the result of the order of the Magistrate under sec. 145 (b), as under sec. 145,

Cr. P. C., the Magistrate's duty is to maintain a party in possession who is found by the Court to have been in possession. But this contention was overruled by their Lordships who observed that the effect of the order under sec. 145 (b), inasmuch as it prohibits the party against whom it operates from disturbing the possession of the other party in whose favour the order is made, is to dispossess the unsuccessful party and therefore the unsuccessful party, if he really was in possession before the order was made, becomes dispossessed in due course of law. But this decision did not lay down that in no case an unsuccessful party in a proceeding under sec. 145, Cr. P. C., could maintain an action under sec. 9 of the Specific Relief Act.

ON THE CONTRARY IN THE JUDGMENT OF Mookerjee, J., there are clear indications that in some cases it would be quite open to the unsuccessful party to institute an action under sec. 9 of the Specific Relief Act. For instance if in a proceeding under sec. 145, Cr. P. C., the Magistrate finds that on the day of the institution of the proceeding one party was in possession, the other party could bring an action under sec. 9 of the Specific Relief Act on the allegation that he was dispossessed by the party successful in the proceeding under sec. 145, Cr. P. C., on a date anterior to the institution of the Criminal proceeding. This dispossession alleged in the possessory suit will be clearly a dispossession otherwise than in due course of law and can support an action under sec. 9 of the Specific Relief Act. The recent case of *Jwala v. Ganga Prasad*, reported at p. 331 of the current volume of the I. L. R., Allahabad Series, affords an illustration in point. In that case, one of the parties was found to be in possession on the 22nd October 1905 by the Magistrate in the sec. 145 proceeding and he was maintained in possession. The other party then instituted a suit under sec. 9 of the Specific Relief Act alleging that he was dispossessed forcibly by the first party on the 10th of October 1905. It was held that he could maintain such an action. His suit was decreed by the Civil Court. In this case it was held by the Allahabad High Court that the unsuccessful party in the action under sec. 9, Specific Relief Act, ought not to be allowed to move the High Court under sec. 622, C. P. C., as there are other remedies open to him such as the institution of a title suit. In the Calcutta case this objection to the revision of the decree of the Civil Court in the possessory action was not raised in the argument and therefore their Lordships did not express any opinion on this point.

## CANONS OF ETHICS

ADOPTED BY

## THE AMERICAN BAR ASSOCIATION.

*The duty of the lawyer to the Courts.*—It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

*The selection of Judges.*—It is the duty of the Bar to endeavour to prevent political considerations from outweighing judicial fitness in the selection of Judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.

*Attempts to exert personal influence on the Court.*—Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstructions of motive, and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

*When Counsel for an indigent prisoner.*—A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

*The defence or prosecution of those accused of crime.*—It is the right of the lawyer to undertake the defence of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defence. Having undertaken such defence, the lawyer is bound by all fair and honourable means to present every defence that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

*Adverse influences and conflicting interests.*—It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided

fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

*Professional colleagues and conflicts of opinion.*—Efforts, direct or indirect, in any way to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the Bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

*Advising upon the merits of a client's cause.*—A lawyer should endeavour to obtain full knowledge of his client's cause before advising thereon, and he is bound to give candid opinion of the merits and probable result of pending or contemplated litigation. Whenever the controversy admits of fair adjustment, the client should be advised to avoid or to end the litigation.

*Negotiations with opposite party.*—A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

*Acquiring interest in litigation.*—The lawyer should not purchase any interest in the subject-matter of the litigation which he is conducting.

*Dealing with trust property.*—Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him.

*Fixing the amount of the fee.*—In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his property may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In fixing fees, it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

*Contingent fees.*—Contingent fees where sanctioned by law should be under the supervision of the Court in order that clients may be protected from unjust charges.

*Suing a client for a fee.*—Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

*How far a lawyer may go in supporting a client's cause.*—Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defence of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes "entire devotion" to the interest of the client, warm zeal in the maintenance and defence of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from

the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defence that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defence. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

*Restraining clients from improprieties.*—A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrong-doing the lawyer should terminate their relation.

*Ill-feeling and personalities between advocates.*—Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

*Treatment of witnesses and litigants.*—A lawyer should always treat adverse witnesses and suitors with fairness and due consideration and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

*Appearance of lawyer as witness for his client.*—When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should not testify on behalf of his client.

*Newspaper discussion of pending litigation.*—Newspaper publication by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any *ex parte* statement.

*Candor and fairness.*—The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a text-book; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing, or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence, which he knows the Court should reject in order to get the same before the jury, by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the Court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

*Attitude toward jury.*—All attempts to curry favor with juries by flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the Court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

*Right of a lawyer to control the incidents of the trial.*—As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement, forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

*Professional advocacy other than before Courts.*—A lawyer openly, and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding to influence action.

*Advertising, direct or indirect.*—Solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional.

It is equally unprofessional to procure business by indirectness through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer.

Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyers' positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling and are intolerable.

*Stirring up litigation, directly or through agents.*—It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust to make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate police-men, court or prison officials, physicians, hospital attaches or others who may succeed,

under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred.

*Upholding the honor of the profession.*—Lawyers should expose without fear or favor before the proper tribunals corrupt and dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The Counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified, because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

*Justifiable and unjustifiable litigations.*—The lawyer must decline to conduct a civil cause or to make a defence when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

*Responsibility for litigation.*—No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what business he will accept as counsel, what causes he will bring into Court for Plaintiffs, what cases he will contest in Court for Defendants. The responsibility for advising questionable transactions for bringing questionable suits, for urging questionable defences, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.—*The Green Bag*.

### CURRENT INDIAN CASES.

ASHARFI v. RUP CHAND, I. L. R. 30 All. 225.  
*Adoption—Jain community—Hindu Law.*

In a suit brought by the heir of a deceased Hindu for the recovery of his property against a person claiming to be the adopted son of the deceased, upon proof or admission of the heirship of the Plaintiff by natural relationship the onus lies upon the Defendant to prove his relationship.

A senior widow can adopt a boy without the consent of her co-widow.

The ordinary Hindu law of inheritance is applicable to Jains in the absence of proof of special customs and usages varying that law and the same rule has been adopted to matters of adoption, although the reasoning on which the law is based is not wholly applicable to the Jains as no spiritual efficacy attaches in their case to adoption.

The marriage of a Jain is no bar to his adoption.

RAM DIN v. BHUP SINGH, I. L. R. 30 All. 225.  
*C. P. C., sec. 43.*

Sec. 43, C. P. C., was held to bar a suit for surplus profits claimed by a usufructuary mortgagor when his suit for redemption did not include such claim.

WILYATI v. NAND KISHORE, I. L. R. 30 All. 231.  
*Alienation pendente lite—C. P. C., sec. 244.*

An alienation *pendente lite* is not permitted to affect the rights of other parties to a suit unless it disables the party who makes the alienation from carrying out the order of the Court, in which case the alienee or assignee must be brought before the Court.

Sec. 244 does not bar a suit by a person who obtains a decree for possession of a share of an undivided property against a purchaser *pendente lite*.

KHIALIRAM v. HIMMATA, I. L. R. 30 All. 238.  
*Registration Act, sec. 50.*

A purchaser of a property is bound by a previous unregistered mortgage of the same although he had no notice of the mortgage at the time of the execution of the sale-deed but received notice before its registration.

KHAIRATI v. BANNI BEGUM, I. L. R. 30 All. 240.  
*Transfer of Property Act, sec. 85.*

A person claiming adversely to a mortgagor and a mortgagee is not a necessary party in a mortgage suit.

EMMEROR v. SERH MAL, I. L. R. 30 All. 243.  
*Cr. P. C., secs 195, 439.*

The High Court can revise an order of a Sessions Judge refusing to revoke an order of sanction to prosecute passed by a District Magistrate.

SHER SINGH v. SRI RAM, I. L. R. 30 All. 246.  
*C. P. C., sec. 266—Attachment—Possible right.*

A possible right of the judgment-debtor cannot be attached; so where there was a mere possibility that there might be money due to the judgment-debtor for profits when the accounts of a certain harvest would be made up, held that the mere right to receive the said profits could not be attached.

HAKIM SINGH v. RAM SINGH, I. L. R. 30 All. 248.  
*C. P. C., sec. 258—Transfer of Property Act, sec. 89.*

Sec. 258, C. P. C., is applicable to a proceeding under sec. 89 of the Transfer of Property Act.

PHULCHAND v. CHAND MAL, I. L. R. 30 All. 252.  
*Mahomedan Law—Gift—Possession.*

Where a donee of an undivided property under the Mahomedan Law obtained possession, held that the gift was valid.

RAM PROSAD *v.* MAN MOHAN, I. L. R. 30 All. 256. *Transfer of Property Act, sec. 85.*

The sons and grandsons of a mortgagor (in a Mitakshara family) brought a suit for redemption; the mortgagee when he had brought the mortgage suit was aware of their existence, yet they were not made parties, *held* that the sons and grandsons were entitled to bring the redemption suit.

#### NOTES OF ENGLISH CASES.

HOUSE OF LORDS (SCOTCH APPEAL).—TOAL *v.* NORTH BRITISH RAILWAY COMPANY, [1908] H. L., A. C., 352. *Railway—Negligence—Accident—Trial by jury.*

Appeal from the first division of the Court of Sessions.

This appeal arose out of an action for damages. The Appellant was a passenger by a train on the Respondents' railway system and alighted at a certain station and while standing on the platform was struck by an open carriage door of the train from which he alighted, which had been re-started by the company's servants; in consequence Appellant was knocked down and he sustained injuries necessitating the amputation of one of his legs. He alleged that the duty of the servants of the company was to close the doors of the carriage before it started; that it was their duty to do so on the occasion of this accident; that they did not close the door and so swept the pursuer from the platform on to the rails; and, further, that the station was so dark that the pursuer could not see after the doors were closed. The Respondents said that the accident was caused by the Appellant's own fault and that the station was properly lighted. The Court of Session refused a trial by a jury. It was contended in appeal that he was entitled to place his case before the jury. *Held* reversing the decision of the Sessions Court that the pursuer was entitled to a trial by a jury.

KING'S BENCH DIVISION.—HALES *v.* KERR, L. R. 1908, 2 K. B. 601. *Evidence, admissibility of—Negligence—Previous conduct.*

Plaintiff sued the Defendant for damages alleging that the Defendant who had been employed for shaving him used razors and other appliances in a dirty and insanitary condition and in consequence he contracted a disease known as barber's itch which incapacitated him from following his employment. Plaintiff examined two witnesses who deposed that they had been shaved at the Defendant's shop and had contracted the same disease. The question was whether the evidence of these two witnesses was admissible. It was *held* that the evidence was admissible in this case

on the ground that it went to establish a dangerous practice carried on in the Defendant's establishment. Channel, J., in delivering judgment remarked as follows:—

"It is not legitimate to charge a man with an act of negligence on a day in October and to ask a jury to infer that he was negligent on that day because he was negligent on every day in September. The Defendant may have mended his ways before the day named in October, moreover, he does not come to trial prepared to meet all the allegations of previous negligence. There are many reasons why such evidence is not admissible on such an issue. But where the issue is that the Defendant pursues a course of conduct which is dangerous to his neighbours it is legitimate to shew that his conduct has been a source of danger on other occasions, and it is a legitimate inference, that, having caused injury on those occasions, it has caused injury in the Plaintiff's case also."

#### Review:

A LAWYER'S MANUAL OF BOOK-KEEPING. BY H. Hughes-Onslow, Master of the Supreme Court. Second Edition. Butterworth & Co., Law Publishers, London.

In this elementary work the author has attempted to explain the principles of book-keeping by double entry as applicable to traders, limited companies and solicitors. Every one, be he a trader or a solicitor, to be able to keep his accounts properly must understand the general principles of book-keeping on which trading or commercial accounts are ordinarily kept. The author, therefore, in the first part of his work explains by illustration the cardinal principles of keeping accounts by double entry. The simple tabular forms by which the author explains a simple mode of keeping the cash book, the ledger and journal will be found very useful. The author gradually introduces the reader to the drawing up of trial balance sheets, the importance of journal or transfer books in the closing of accounts and the investigation of final balance sheets. The third part of the book deals exclusively with the keeping of solicitor's accounts. Without a general knowledge of book-keeping, it is needless to say, that no solicitor, young or old, can keep his books properly or see that his books are kept properly. This work will be found useful by lawyers not only in keeping their accounts in a simple form but also familiarise them with the system of commercial book-keeping, a knowledge of which is indispensable in the practice of law.



**Notes of Cases.**

**CALCUTTA HIGH COURT.**

**Recent decisions not yet reported.**

(The important cases to be fully reported hereafter.)

**CRIMINAL APPELLATE JURISDICTION.** Before HOLMWOOD and RYVES, JJ. REFERENCE NO. 28 AND APPEAL NO. 804 OF 1908. SUKHA URAON, Appellant *v.* THE EMPEROR. 12th November 1908.

*Sentence under sec. 302, Indian Penal Code—Transportation in lieu of death sentence—Murder committed in the belief that the deceased possessed witch-craft.*

The facts found against the Appellant were that he caused the death of one Daria Chamar by striking him with an axe. The deceased was believed by the accused and other persons of the community in which the deceased lived to possess powers of witch-craft and to have exercised those powers to the detriment of the accused and others by causing the death of their relatives and cattle. The Appellant was found guilty and sentenced to death.

Their Lordships observed:—

"We are satisfied that Sukha (the Appellant) himself shared this opinion and therefore we hold that although the murder was premeditated and treacherously carried out, nevertheless having regard to the low state of intelligence obtaining among these people we think that the lesser penalty allowed by law will satisfy the ends of justice. It is clear as the learned Judicial Commissioner himself remarked that Sukha did not realise the wickedness of his act in killing the deceased but on the contrary possibly thought he was doing a meritorious act in ridding the community of a dangerous enemy. We therefore hold that although the facts clearly fall within the definition of murder, yet we do not think it necessary to confirm the capital sentence."

*Sentence commuted into transportation for life.*

B. C.

**CRIMINAL REVISIONAL JURISDICTION.** Before SHARFUDDIN and COXE, JJ. CRIMINAL REVISION NO. 1009 OF 1908. HOR ALI and NAWAB ALI, Petitioners *v.* THE KING-EMPEROR. 10th November 1908.

*Surety—Refusal to accept—Omission to state reasons for—Criminal Procedure Code, sec. 122.*

The Sub-divisional Magistrate of Naraingunge rejected certain sureties for the Petitioners' good behaviour who were offered after the conclusion of a proceeding under sec. 110, Cr. P. C., against them. But the Magistrate did not record any

reasons for his refusal to accept the sureties. The Petitioners moved the High Court and obtained a rule.

Their Lordships observed:—

"The sureties that had been offered by the Petitioners were refused by the Magistrate without recording his reasons for so doing as required under the provisions of sec. 122, Cr. P. C. From the explanation submitted by the Magistrate, it appears that, as he failed to record the reasons for which he considered the sureties to be unfit, he is not able now to remember the exact circumstances.

In these circumstances the sureties that had been offered by the Petitioners must be accepted by the Magistrate. We make the rule absolute."

*Mr. Sowghat Ali for the Petitioners.*

B. C.

*Rule made absolute.*

**CIVIL APPELLATE JURISDICTION.** Before CASPERSEN and COXE, JJ. APPEAL FROM APPELLATE ORDER No. 87 of 1908. CHATURBHUI MARWARI AND OTHERS, Appellants *v.* A. W. WALKER, ESQ., Judgment-debtor, Respondent. 13th November 1908.

*Bengal N. W. P. and Assam Civil Courts Act, sec. 13—Local jurisdiction—No order assigning civil business—Application for execution where to be made.*

An application was put in before the Deputy Commissioner of Singbhum for execution of decree. The Deputy Commissioner's office registered the application and then forwarded it by post to the Subordinate Judge of that District, who was at that time sitting in Purulia. When the case came before the Subordinate Judge at Purulia, notice was issued under sec. 248, C. P. C., to the judgment-debtor. The judgment-debtor appeared and put in an objection in which he pleaded, among other matters, that the Subordinate Judge had no jurisdiction to proceed with the execution. This was rejected by the Subordinate Judge and he passed the following order:—"Judgment-debtor's objection disallowed. No further steps. Case dismissed for want of prosecution."

Against that order the judgment-debtor thought fit to appeal to the Judicial Commissioner of Chota Nagpur; and the Judicial Commissioner came to the conclusion that the Subordinate Judge had no jurisdiction to deal with the application and that no further proceedings should be taken in the Court of the Subordinate Judge.

The decree-holder appealed to the High Court.

*Held*—Under sec. 13 of the Bengal, N. W. P. and Assam Civil Courts Act, if the same local jurisdiction is assigned to two or more Subordinate Judges, the District Judge may assign to each of them such civil business as he thinks fit; but where, as in the present case, no such order assign-



ing civil business had been passed, both the Subordinate Judges had concurrent jurisdiction and were both equally entitled to deal with an application for execution arising in the District of Sighbhum.

*Mr. Caspersz and Babu Nalini Ranjan Chatterjee for the Appellants.*

*Babu Bepin Chandra Ghose for the Respondent.*

A. T. M.

*Appeal allowed.*

**CIVIL APPELLATE JURISDICTION.** Before MITRA and CHITTY, JJ. APPEAL FROM APPELLATE DECREES Nos. 2058 and 2218 OF 1906. SURENDRA NATH SEN AND OTHERS, Appellants *v.* DINABANDHU NAIK, Respondents. 17th November 1908.

*Ejectment, suit for—Lease by raiyat—Covenant for fresh settlement, vague and indefinite, if enforceable.*

A raiyat executed a lease for 9 years in favour of a certain under-raiyat. By that lease, it was agreed that the tenancy of the Defendant would expire at the end of nine years. The present suit was instituted after the expiry of those 9 years and the only defence the Defendant raised was that under a clause in the lease, he might apply for resettlement and the Plaintiff would be bound to grant him a re-settlement without any bonus. The clause in the lease was to the following effect: "That if you (under-raiyat) are willing to take re-settlement, I (raiya) shall settle with you without taking any bonus." The lower Appellate Court held that he was entitled to get a fresh *bundobust* of the land.

*Held*—That the covenant in the lease for the renewal of settlement was vague and indefinite and no Court would give effect to it. If the conditions of re-settlement were specific the Defendant might have pleaded in defence of the suit his right to specific performance as against his landlord raiyat.

*Babu Nalini Ranjan Chatterjee for the Appellants.*

*Babu Sarat Chunder Ghose for the Respondents.*

A. T. M.

*Appeal allowed.*

**CIVIL APPELLATE JURISDICTION.** Before MITRA and CHITTY, JJ. APPEAL FROM APPELLATE DECREE No. 783 OF 1906. PRASANNA KUMAR NANDI, Plaintiff, Appellant *v.* UMEDAR RAJA CHOWDHURY AND OTHERS, Defendants, Respondents. 18th November 1908.

*Hindu Law—Widow, alienation by—Deed, interpretation of—Legal necessity—Life-interest, passing of.*

The claim in this case related to a twelfth share of certain immoveable properties described in the schedule to the plaint. They were at one time owned by three brothers Kassi Nath, Biswa Nath and Jagan Nath. Kassi Nath's one-third share

devolved on his son, the Defendant No. 13. Biswa Nath died sonless in the year 1874 and his one-third share devolved on his widow, Vishnu Priya, who died in the year 1902. Biswa Nath left him surviving a married daughter Joy Tara, but she was sonless and became a widow in the life-time of Vishnu Priya. Jagan Nath also died while Vishnu Priya was alive. The Plaintiff and the Defendants Nos. 14 and 15 were sons of Jagan Nath. The Plaintiff was thus entitled to a twelfth share under the Dayabhaga School of Hindu Law.

The contesting Defendants were the purchasers of the share of Biswa Nath from Vishnu Priya and they set up three deeds of transfer in support of their claim—two of the year 1881 and one of the year 1886. The first two deeds were executed by Jagan Nath and Vishnu Priya and covered their respective shares in some of the properties, the subject of the present suit. The deed of 1886 was executed by Vishnu Priya alone in favour of Joy Tara who, it was admitted, was *benamdar* of the Defendant No. 13.

The lower Courts dismissed the claim of the Plaintiff holding that there were necessities justifying the sales by Vishnu Priya. The Plaintiff appealed to the High Court.

*Held*—That the deeds of transfer purported to convey only the life interest of Vishnu Priya and the purchasers merely got the limited estate of a Hindu widow and not the absolute estate left by her husband.

A Hindu widow in possession of her husband's estate as his heiress may, if she pleases, and for legal necessity, alienate only her limited estate, and the mere existence of such necessity would not be sufficient evidence to show that the entire estate was transferred, if the deed of transfer showed without ambiguity that what was transferred was only the widow's limited estate. The widow has the option of selling either her limited estate or the entire estate.

*Babu Harendra Narayan Mitter for the Appellant.*

*Dr. Rash Behary Ghose, Mouvis Syed Samsu Huda and Nuruddin Ahmed and Babu Biraj Mohun Majumdar for the Respondents.*

A. T. M.

*Appeal decreed.*

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### REPORTS (See Index.)

THE HIGH COURT HOLIDAYS FOR THE YEAR 1909 have not been as yet announced. We may point out for the consideration of the Hon'ble Judges that the closing of the High Court several weeks before the closing of the District Civil Courts causes some amount of inconvenience and hardship to litigants and members of the legal profession both in Calcutta and in the Mofussil. We invite attention to their views of the matter which we have attempted to represent through our columns (11 C. W. N. cccxxxv and 12 C. W. N. ccxxxiii). In 1909 the Pooja comes off about three weeks later. We would venture to suggest, therefore, that in fixing the Pooja vacation for 1909, it should be so arranged that it might include the Durga Pooja, the Jagadhatri and Kartik Poojas.

WE DEEPLY REGRET TO HAVE TO RECORD THE death of Rai Bahadur P. Anand Charlu, C. I. E. He was one of the leading vakils of the Madras Bar. For many years he represented the Madras Presidency in the Viceregal Legislative Council. He owed his seat in the Council to election and was always staunch in representing there the progressive views of his countrymen. He was a man of sterling independence but the amiability of his character and rare good nature made him universally popular with all communities. In his opposition of measures he was frank and outspoken to such a degree and so very impersonal and entertaining in his observations that it was

always a pleasure even to his opponents to listen to him. In private life his ever cheerful disposition, genial manners and genuine good heart had secured him a very large circle of friends both in this city and in his own and other provinces. As a public man he leaves a long record of public services in the Municipal, Provincial and Supreme Councils and in connection with the Indian National Congress as one of its most level headed leaders and ex-President. His death at the present time is an irreparable loss to the country. His ideas in social and religious matters were of the progressive order and for the prevention of the abuse of the Hindu religious endowments he had worked hard and long; the securing of their proper application to the service of the community by a moderate measure of legislation was the dream of his life. His literary attainments were also of a high order. He was a good writer in his own vernacular, a very clear, chaste and pleasant English speaker on the platform, a very unassuming Sanskrit scholar and well versed in *Smriti*. His knowledge of Hindu Law, his demonstration of his Sanskrit scholarship, the Pandit of the ancient Hindu University of Navadvipa conferred on him the very appropriate title of *Vidyavinoda*, meaning, an accomplished scholar. He was an occasional contributor to our columns and among his contributions we may notably mention his article "Marriage with Maternal Uncle's Daughter" which has recently been referred to in Mr. Trevelyan's new work on Hindu Family Law, p. 36. (See 7 C. W. N., pp. lxxii, xc, xcvi). We convey our sincere condolence to the bereaved family.

LORD LOREBURN'S BILL FOR THE STRENGTHENING of the final Court of Appeals in England, namely, the House of Lords and the Judicial Committee of the Privy Council, promises to make some changes in the constitution of these bodies. With regard to the Judicial Committee the Bill provides for the addition of two Judges or ex-Judges from India. The Act of 1833 also provides for the appointment of two Indian Judges but fixes the remuneration of each Judge at £400 per annum. But a later Act provides that when there is but

one Judge the whole of the £800 is payable to him. Sir Arthur Wilson is now the only Judge of Indian experience who is a member of the Judicial Committee. In case a second Indian Judge should be appointed, under the existing Statutes his remuneration will have to be shared with the second Judge. Hence the object of the new Bill is evidently to make provision for two such Judges on more adequate remuneration. So after all the proposed legislation does not go far enough to substantially strengthen the Judicial Committee.

WE ALSO UNDERSTAND THAT THE RULES REGULATING the procedure and practice of the Judicial Committee are being consolidated and amended. One of the amendments propose to shorten the period during which an appellant can put in appearance after the record arrives in England. At present the period is six months with regard to countries to the east of Cape Good Hope and three months with regard to other countries. These periods were fixed in 1853 with reference to the time taken by sailing vessels for a voyage from the East to England. In these days of fast steam vessels His Majesty's Council consider that the application of these periods ~~for a voyage~~ to put in appearance ~~of these periods~~ personally or through counsel. Another proposed amendment is in respect of leave to appeal in *forma pauperis*. At present persons applying for such leave have to swear that they are not worth £5. In the House of Lords, however, the amount is £25. The Council now recommend ~~the rule for the Judicial Committee should~~ in this respect be identical with that of the House of Lords.

THE MATTER OF THE SUSPENSION OF THE CHIEF Justice of Grenada by the Governor did not come up before the Judicial Committee by way of appeal, as is popularly believed, but on a reference. The present is not also the first reference of its kind. Several references relating to the conduct of Colonial Judges are to be found in the law reports. In the present instance some grave charges were brought against Chief Justice Bayldon Walker. It is satisfactory to note that in the present instance the Lord Chancellor intimated that their Lordships would reserve judgment but advise His Majesty that the evidence was insufficient to support the charges. We expect that the judgment of their Lordships in this matter will be one of special interest.

THERE IS ALSO SOME MISAPPREHENSION IN PUBLIC mind regarding the presence of Lord Wolverhampton (formerly Sir Henry Fowler and once the Secretary of State for India) in the Judicial

Committee of the Privy Council during the hearing of the reference in the matter of the alleged misconduct of the Chief Justice of Grenada. It is not an innovation, but as a matter of fact a revival of an old practice. Lord Brougham's Act which reconstituted the Committee made the Lord President a regular member of this august tribunal. It would appear from this Act that the Lord President takes precedence over the Lord Chancellor when setting in this tribunal. But it is interesting to note in this connection how a statute is sometimes overridden by the practice of a judicial tribunal. The later volumes of the Privy Council reports show that the name of the Lord Chancellor appears first. In the present instance also the opinion of the Committee was pronounced by the Lord Chancellor and not by the Lord President. The statute provides that the only members of the Judicial Committee who need not be lawyers are the Lord Presidents. It is not, however, the ordinary practice for non-lawyer members of the Judicial Committee to sit for hearing appeals. Most of the cases in which Lord Presidents have sat, like the present one, have been more of an administrative character than judicial. ~~Therefore~~ the Committee not as a solicitor or a lawyer but as a layman in his capacity of Lord President. It is a very strange legal anomaly that a solicitor under this particular statutory provision has to be regarded as a layman.

SEC. 72 OF THE INDIAN CONTRACT ACT PROVIDES that a person to whom money has been paid or anything delivered by mistake or under coercion, must repay or return it. It is difficult to say upon the terms of this section alone whether payments made "under protest" upon illegal demands made by public authorities, or payments made by a person under a mistake of law—a payment for instance by A of a decree against B when his property has been attached as B's—come within the operation of this section. As a matter of fact, such cases when they come before our Courts are seldom decided without reference to English case law. We reproduce in another column a thoughtful note from the *Harvard Law Review*, which examines the grounds upon which Courts are supposed to grant relief in cases of non-voluntary payments made through mistake or compulsion.

WE THOUGHT THAT WE HAD HEARD THE LAST of the scheme for raising a University Law College on the ashes of some of the existing law colleges when the late Lieutenant-Governor (the Rector) refused to be a party to any such scheme. But almost on the eve of his retirement, the syndics of the University called upon a number of the law colleges hitherto affiliated to the University to show

cause why they should not be disaffiliated. Barring the newly constituted University of Calcutta, we know of no University in any part of the world which is so anxious to help the colleges affiliated to it out of existence. It has been suggested in the public press that this desire for disaffiliation of the law colleges is a part and parcel of the scheme for laying the foundation of a University Law College on the grave of some of the existing colleges. We do not consider that it would either be dignified or proper on the part of a University to commit itself to any course of conduct which might be viewed in that light. Should the University authorities allow any such considerations to influence them in withdrawing the affiliation of the existing colleges, we are sure that either His Excellency the Chancellor or His Honour the Rector will again intervene and see any injustice done or threatened to the existing colleges remedied. It is believed that no inconsiderable amount of unrest amongst young men is due to the constant and continued narrowing down of the educational facilities since the passing of the Universities Act and the framing of some drastic regulations notably for the Calcutta University.

THE PRESENT UNIVERSITY ADMINISTRATION, notably with reference to the fixing of the date of the preliminary examination for the degree of the Bachelor of Law, has given rise to a considerable amount of dissatisfaction both amongst the students and their parents and guardians. The last examination under the old regulations was held on the 23rd of November last. Under the new regulations the B. L. examination will be held in two parts, the preliminary and final. Those who may be plucked in the B. L. examination held in November last have to offer themselves for the preliminary examination under the new system next year. The first preliminary examination under the new regulations will be held in the beginning of January 1909. But the result of the November examination will not be out before the middle of January 1909. The result is that most of the examinees who appeared in the B. L. examination which is just over are now depositing a further instalment of examination fees so that in case of failure they may not be put back for a year. The effect of this arrangement is that the University will be a gainer by the amount of fees deposited by those who may pass the November examination and the latter will be losers to the same extent. Every one is asking why the University could not put off the date of the next preliminary B. L. examination as also the date for the deposit of fees for the same till the results of the November examination are published? Surely the University may even now postpone the examination for a few weeks and refund the fees

for the preliminary examination to those who may pass in the November examination. But the Registrar on behalf of the Vice-Chancellor tries to make out in the public press that the University decrees are, unlike other human decrees, irrevocable. When more august human institutions, such as the Imperial Parliament or the Supreme Council of India are known to alter their dates of meeting, we see no reason why the University cannot alter the dates of examinations. This is another matter to which we would invite the Chancellor's and the Rector's attention.

### PUBLIC POLICY IN LAW.

Contracts and other juristic acts are sometimes set aside on the ground that if they are permitted to have legal effect, they will defeat public policy. What is public policy has not however been defined in our Codes and it is difficult to say how far the doctrine of public policy can be safely extended or what are its limits. Cases can be found in the reports in which judges declined to give effect to contracts on the ground that they were opposed to public policy according to their own views of it. Judicial functions of a judge should always be differentiated from those of the legislator. The judge has to apply the law as it is on its proper interpretation, but it is not his province to make laws by way of giving expression and effect to his own views as to public policy. An eminent judge once said "public policy is an unruly horse and dangerous to ride," see *Mogul Steamship Co. v. McGregor Gow & Co.*, (1882) A. C. 25 at p. 46 in the case of *Indra Prastha*, (1891) 1 C. B. 594 Cave, J., observed: "Certain kinds of contracts have been held void at common law on the ground of public policy; a branch of the law, however, which certainly should not be extended as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy."

The recent case of *Hyams v. Stuart King*, reported at (1908) 2 K. C., p. 697, affords an illustration of the applicability of the doctrine of public policy. In this case the Plaintiff and the Defendants were engaged in some betting transactions with the result that the Defendants lost some of the bets and gave a cheque to the Plaintiff for the amount of the bets lost by them to the Plaintiff. Subsequently the Plaintiff was requested by the Defendants not to present the cheque, as money which they had expected had not arrived. The Plaintiff complied and a part of the amount of the cheque was paid by the Defendants. Later on the Defendants again requested the Plaintiff to hold it over as if certain persons came to know of the cheque and the Defendants' default in payment, it would ruin the Defendants' business. Afterwards the Plaintiff demanded the balance

due to him and threatened to take proceedings against the Defendants. The Defendants thereupon promised to pay the amount due and asked the Plaintiff not to ruin them by taking proceedings or declaring them to be defaulters. The Defendants did not keep their promise, although the Plaintiff at the Defendants' request did not take proceedings or declare the Defendants defaulters. The Plaintiff then brought a suit against the Defendants for the recovery of the amount due under the promise of the Defendants.

It was urged on behalf of the Defendants that the contract which the Defendants made was not enforceable being opposed to public policy. This contention of the Defendants was overruled by the majority of the learned Judges in the Court of Appeal who held that the contract was not opposed to public policy. 'Sir Gorell Barnes, President, observed—"it is necessary to avoid confusion between judicial and legislative functions, and, although there have been cases from which it would seem as if an almost unlimited right had been claimed by the Courts of deciding cases according to the judges' views of public policy, for the time being, there is now more precision in dealing with questions of public policy. The doctrine by which contracts are held void as being against public policy must be applied with caution and care must be taken not to lay down new principles of public policy without sufficient warrants." Again the same learned Judge observed: "No evidence is given in these public policy cases. The tribunal is to say, as matter of law, that the thing is against public policy and void. ~~From the facts of the particular case Farwell, L. J., observed:—"There is certainly nothing illegal in paying or receiving payment of a lost bet: it is something for the law to refuse to assist either party in their folly, if they will bet, it is quite another to forbid the loser to keep his word. Lost bets are still regarded as debts of honour; in other words, all honourable men regard the payment of money lost on a bet as a duty of imperfect obligation and the payment of bets is indirectly enforced by the social stigma attached to a defaulter &c. . . . There is nothing illegal in an unpaid winner calling to his aid those resources, and if so, there is nothing illegal in his agreement not to do so in consideration of the payment of the amount of a lost bet." The learned Judge held that the contract to pay the amount of a lost bet in consideration of the unpaid winner refraining from posting up the losers as defaulters and thereby exposing them to social stigma was a valid contract enforceable in law and further observed: "The doctrine of public policy is regarded now-a-days as one rather for the Legislature than the Courts although the Courts will not shrink from~~

acting on it if the contract sought to be enforced leads to immorality or crime."

In support of the view that the contract in this case was unenforceable it might be urged that if such a contract is to have legal effect, it will defeat the provisions of law that money lost on bets could not be recovered by suit. The dissentient judge, Fletcher Moulton, L. J., observed:—"If a son loses a bet of £20 which he cannot pay, it makes no difference, in my mind, whether the bookmaker (i.e., the unpaid winner) says "I will tell your father if you don't pay the bet or I will tell your father if you don't give me £20. In the one case he is trying to get a contract to pay a bet and in the other case a contract to pay a blackmail. Neither of these contracts will be enforced by law."

There is no doubt that a contract to pay a sum of money in consideration of the amount lost on bet is a contract without consideration, for promise to pay what cannot be legally recovered is no consideration at all. But here the case was a little different—the promise was not to pay the amount lost on bet but the promise was to pay a certain sum equal to the amount of the unpaid balance of the lost bet in consideration of the winner forbearing from exposing the loser's default. One might say the distinction is very nice. In its support it is said that betting is not declared by the Legislature to be illegal and if a loser pays the amount of the lost bet to the winner, the winner is perfectly entitled to enjoy the money and it cannot be recovered back from him.

On the question of public policy we might also refer to the recent case of the *Silarampur Coal Co., Ltd. v. T. H. Colley*, reported at 13 C. W. N. 59, in which Fletcher, J., held that a contract which the Plaintiff company made with the Defendant who was an inspector of boilers employed by the Government of Bengal in the office of the Commissioners for the Inspection of Steam Boilers, for the purpose of acquiring two boilers which the Defendant was to purchase for the Plaintiff, was void as being opposed to public policy. The learned Judge was of opinion that the contract imposed on the Defendant duties which might conflict with the duties he owed to the public. His Lordship observed "if the Defendant had been sent to inspect the boiler, there is a strong probability that he would have tried to pass it, having regard to the fact that he had advised the Plaintiffs to purchase it. The duty cast upon the inspectors under the Act and regulations is to hold an independent inspection of the boiler in order to see whether the boiler is safe for use. The object of the Act is to prevent loss of life by reason of user of defective boiler."

But might it not be said that if the Legislature thought that such a contract ought not to be entered into by such public servants, the Legis-

lature would say so in clear terms. Does it fall within the province of the law Courts to prohibit such contract on the ground of public policy. If the inspector failed to discharge his duties honestly, there is ample provision in law for meting out to him a sufficient punishment. But it may be questioned whether a contract otherwise good should be declared void on the ground that it might lead one of the parties to a dereliction of duty. In this case the contract itself, like gaming or wagering contracts, cannot be said to be void.

In the English case the tendency of judicial interpretation is to raise a superstructure of valid contract out of a transaction which is wholly void in law, and which has been declared by the Legislature to be opposed to public policy. It is only the dissentient judge, Lord Justice Fletcher Moulton, who held the contrary and presumably the right view of the matter. It would be interesting to know which view will ultimately prevail in the House of Lords.

The Indian and English decisions under review have nothing in common. On the contrary they may be said to be diametrically opposed in their tendencies. One tries to evolve a valid contract out of a void transaction. The other declares a contract, apparently legal, invalid on the ground of public policy. The only thing common between the two is that they both serve to illustrate that the expression public policy in legal phraseology has yet to acquire a definite meaning.

#### RECOVERY OF PAYMENTS MADE UNDER COMPULSION.

The general rule is that one cannot recover money voluntarily paid with full knowledge of the facts, although the claim in satisfaction of which the payment was made was, in fact, illegal (*Elston v. City of Chicago*, 40 Ill. 514). The policy of the law denies that a man may take inconsistent positions, repudiate his act and disturb a settlement voluntarily made by him, even though no sufficient consideration was received (*Peters v. R. R. Co.*, 42 Oh. St. 275). But this objection is not applicable to acts done under compulsion. It is therefore well settled that in the absence of consideration payments made involuntarily or under compulsion may be recovered at law. Recovery is founded, not, as in equity, on a rescission through the unfair advantage taken, but on a quasi-contract through failure of consideration. The effect of the compulsion is simply to explain the apparent inconsistency of the payment and the repudiation (*Pollock, Contracts*, 3 Am. Ed., 732). This rule mitigates the harshness of the narrow common law doctrine of duress. For, whereas the equitable doctrine of undue influence is broad and sweeping, extending to all transactions in which one party has been deprived of a free and deliberate judgment (*Williams v. Bayley*, L. R. 1 H. L. 206), the common law doctrine of duress is limited to actual coercion, by injury to or unlawful imprisonment of the person, or threats of such injury or imprisonment (*Sheate v. Beale*, 11 A. & E. 983).

The test for determining what amounts to such compulsion as will justify a recovery under the rule must of necessity be somewhat vague, considering the finite variety of pos-

sible situations. "There must be some actual or threatened exercise of power, possessed, or believed to be possessed, over the person or property of another, from which the latter has no other means of immediate relief than by paying" (*Radich v. Hutchins*, 95 U. S. 210; *Brumagin v. Tillinghast*, 18 Cal. 265). Hence it has been held that a payment is involuntary if made to prevent a wrongful taking or detention of the Plaintiff's property (*Baldwin v. Liverpool*, etc., S. S. Co., 74 N. Y. 125), or to avoid injury to the Plaintiff's business (*Swift & Co. v. U. S.*, 111 U. S. 220), or to induce the Defendant to perform a duty (*Dew v. Parsons*, 2 B. & Ald 562). But in any event, although all the cases are not clear on the point, there must be some necessity actually existing or reasonably believed by the Plaintiff to exist; otherwise he could withhold payment for a determination of the dispute at law. Failing that, he has no excuse for repudiating his act.

In a recent case a subscriber, with full knowledge of the facts (though probably not of the law) and without consideration paid a telephone company a higher rate than it could legally charge. It was held that he could not recover. *Illinois Glass Co. v. Chicago Telephone Co.*, 234 Ill. 533. The absence of a protest is not fatal to recovery, just as its presence will not make an otherwise voluntary payment involuntary (*Lamborn v. Commissioners*, 97 U. S. 181). It is effective merely as evidence tending to show that compulsion was the inducing cause of the payment (*Wasson v. Land & Mortgage Co.*, 3 N. D. 160). When the parties stand on unequal footing, as between a corporation and an individual, there is a great opportunity for compulsion, and hence there may frequently be recovery (*G. W. Ry Co. v. Sutton*, L. R. 4 H. L. 220; *Petters v. R. R. Co.*, supra; *R. R. Co. v. Coal Co.*, 79 Ill. 128). But the case seems correct in holding that the mere fact of inequality does not, as a matter of law, render the payment compulsory. If one objects that the result is unjust to the Plaintiff, he should quarrel, not with the refusal of the Court to extend the doctrine of compulsory payments, but with the rule which denies recovery of a payment made under a mistake of law. See 21 Harv. L. Rev. 225. To recover on the former ground, the Plaintiff should show not only the opportunity for compulsion, but that the compulsion was exercised and did induce the payment. — *Harvard Law Review*.

#### Reviews.

HINDU FAMILY LAW as administered in British India. By Ernest John Trevelyan, D. C. L., London: W. Thacker & Co., 2, Creed Lane, E. C. Calcutta and Simla: Thacker, Spink & Co., 1908.

When the learned author of this treatise was first brought into contact with the law of the Hindus, that law, in so far at least as it found expression in the decisions of the High Courts and the opinions of Indian and Anglo-Indian writers, was in a considerably more nebulous condition than it is to-day. During the last forty years, a more or less uniform course of decisions on subjects which come up more frequently for consideration before our Law Courts has marked out the broad outlines of that law in a manner which, in point of precision and publicity, may now be said almost to rival legislative enactment. This process of judicial interpretation has been at work, so to speak, almost under the author's eyes. It is therefore very appropriate that his should be the task of gathering

results attained by Courts and commentators during a period which roughly speaking has coincided with his own acquaintance with that law.

The term "Family Law" as used in the title may seem somewhat ambiguous. It is used by the author to comprehend the following subjects only. Marriage, Relation of Husband and Wife, of Parent and Child (this topic including the subject of Adoption), Joint-family, Joint-family property—the last necessarily involving a consideration of the question of the son's liability under Mitakshara Law for the father's debts—and lastly Partition and Reunion. It may seem difficult to restrict Hindu family law within these limits. Hindu law centres round the family and every branch of it has more or less to do with the family. However, dealing as it does with those topics of Hindu Law which are more intimately concerned with family relations, this work constitutes a valuable contribution to that law.

The law is gathered, as we have indicated, from such varied sources as judgments of Courts, authoritative text-books and commentaries approved by Courts, an attempted authors, Indians as well as Anglo-Indian. There is no attempt at learned discussion on disputed topics from the author's own point of view. Comments and criticisms, when unavoidable, are generally relegated to the footnotes. The introductory chapter and those on marriage, the relation of husband and wife and their respective rights and liabilities are particularly interesting. The manner in which these (for a European) somewhat difficult topics have been handled shows considerable insight into Hindu law. As we have already stated, there are no lack of materials, but these have been worked up with an amount of thoroughness and judgment which will considerably lighten the labours of the Bench and the Bar in getting a real insight into the questions dealt with in their work. The work will assuredly find a place amongst text-books of recognised merit and authority.

DESAI'S INDEX OF CASES judicially noticed, 1811—1907. By *Bulwantrai R. Desai, Baroda*. Price Rs. 9, Postage extra. Printed at the *Lakshmi Vilas Printing Press, Baroda, 1908*.

Although the fact is not mentioned on the title page, this is the second edition of the work. In compiling his Index, Mr. Desai has departed from the principle adopted by previous compilers, in that he has cited cases not by their names but by the volumes and pages of the reports in which they occur. This plan has its advantages as also its drawbacks, and in practice one finds it necessary to keep both Mr. Desai's and Mr. Nanibyar's works (of which the latter follows the other system) for purposes of reference. It is therefore very

much to be regretted that the rival compilers should have thought fit to enter openly into a heated controversy regarding the merits of their respective systems, and we certainly think the concluding paragraph of Mr. Desai's preface to the second edition to be the least meritorious portion of the work. We have, however, nothing but praise for the work itself. The present edition shows considerable advance over its predecessor in get up and general appearance. It is also well up to date. We have no doubt that the improvements effected in the present edition will enhance its well-earned popularity.

## Notes of Cases.

### CALCUTTA HIGH COURT.

#### Recent decisions not yet reported.

(Judgments are to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before SHARFUDDIN and COXE, JJ. CRIMINAL REVISION No. 952 OF 1908. KISHORI LAL PAMRE AND ANR., Petitioners v. THE EMPEROR, Opposite Party. 10th November 1908.

*Criminal Procedure Code (Act V of 1898), secs. 133, 135, 137, 138, 141—Whether a person against whom a conditional order has been passed, can both ask for showing cause and appointment of a jury.*

In this case a conditional order under sec. 133, Cr. P. C., was passed against the Petitioners to remove an obstruction from a road and the Petitioners were ordered to remove the obstruction or to show cause against the order on the 26th May 1908. On that date they appeared and put in an application in which they both showed cause against the order and also applied to the Magistrate for the appointment of a jury. Subsequently however the Petitioners pressed their prayer for the appointment of a jury. The jury was appointed but as they failed to submit their report within the ample time allowed by the Magistrate, the Magistrate made the order absolute under sec. 141, Cr. P. C. Against this order this Rule was obtained. One of the contentions on behalf of the Petitioner was that after the jury failed to submit their report, the Magistrate ought to have taken evidence for the Petitioners in the matter as prescribed by sec. 137, Cr. P. C.

Their Lordships on the merits held that the Petitioners did not ask the Magistrate to take evidence as prescribed by sec. 137 and therefore the Magistrate was justified in proceeding under sec. 141, Cr. P. C. As regards the other points involved in the case their Lordships observed:—

"In our opinion an application for both these reliefs (i.e., showing cause against the order and applying for the appointment of a jury) cannot be



made under sec. 135, Cr. P. C. That section gives the person against whom the order is passed the right to adopt either of these alternatives, either to show cause or else to apply for a jury. If the person proceeded against fails to do either, the consequences prescribed by sec. 136 follow. If he adopts the former alternative, the Magistrate is bound to take action under sec. 137, and if he adopts the second alternative then the Magistrate is bound to take action under sec. 138. Both secs. 137 and 138 are imperative in their nature." . . .

"It may be the case that after a jury have failed to perform their duty through no fault of the person against whom the conditional order has been passed, that person may perhaps be allowed to revert to the other alternative given him by sec. 135. In that case the Court may take evidence under sec. 137 and dispose of the matter under that section read with sec. 141."

*Babu Hemendra Nath Sen* for the Petitioners.

B. C. . . . *Rule discharged.*

CIVIL APPELLATE JURISDICTION. Before MITRA and CHITTY, JJ. APPEAL FROM APPELLATE DECREE NO. 2106 OF 1907. *TAMIJUDDI alias JO-NAI DHALI*, Appellant *v.* *SABULLA AND ANOTHER*, Respondents. 10th November 1908.

*Under-riyat—Bengal Tenancy Act, sec. 85, sub-sec. (2)—Void against whom.*

The Defendant No. 2 was the superior landlord. The Defendant No. 1 held a plot of land under him. This plot was a portion of a holding held at one time by a riyat Arman Howladar under the Defendant No. 2. In 1889 Arman granted a lease of it along with other plots of land to the Plaintiff. The lease was one from year to year; it was not permanent or for a term of years. The Defendant No. 2 dispossessed the Plaintiff but the Plaintiff was still in possession of other plots which he held under Arman. The present suit was instituted by the Plaintiff for recovery of possession of that plot, on the ground that he was at least a tenant from year to year under Arman and that the Defendant had no right to dispossess him.

On the above facts the Munsif held that the Plaintiff was entitled to succeed and gave him a decree for possession. The Lower Appellate Court came to the conclusion that under sec. 85 of the Bengal Tenancy Act, the lease granted by Arman to the Plaintiff was void and also that the Plaintiff had no title to rely on in a suit for recovery of possession.

It was found that the interest of Arman, as that of a riyat, had not been put an end to.

*Held*—That the Plaintiff had title to sue for possession of the disputed plot. He was, under the terms of lease to him, a tenant from year to year, and even if the lease was void for certain

purposes, it was not void against his own landlord Arman: and, as long as Arman's interest was not put an end to, the Defendant No. 2 had no right to eject the Plaintiff who was not his riyat.

Sub-sec. (2) of sec. 85 of the Bengal Tenancy Act was put in for the benefit of the landlord only to prevent the registration of the document if it creates a tenancy of more than 9 years or in perpetuity.

There is nothing in sec. 85 to make the lease to the Plaintiff void for all purposes.

• *Gopal Mandal v. Ishan Chunder Banerjee* (I. L. R. 29 Cal. 149) and *Chandra Kapali v. Jaki kar* (6 C. W. N. 377), referred to.

• *Sricant Mandal v. Saroda Cant Mandal* (I. L. 26 Cal. 46), *Fosil Sheikh v. Keramuddi Sheikh* (W. N. 916), *Ramgati Madal v. Syama Churn* (9 C. W. N. 919) and *Basaratulla Mundle v. Karimunnessa Bibi* (11 C. W. N. 190), explained.

*Dr. Priya Nath Sen* for the Appellant.

*Moulvi Wahed Hossain* for the Respondents.

A. T. M.

*Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before CASPERSZ and COXE, JJ. APPEAL FROM APPELLATE ORDER NO. 70 OF 1908. *BEPIN BEHARY SHAHA* (Opposite Party), Appellant *v.* *MOHENDRA LAL GHOSH AND ANOTHER* (objector), Respondents. Heard, 13th November 1908. Judgment, 18th November 1908.

*Redemption, suit for—Deposit of decretal amount after date fixed—Transfer of Property Act (IV of 1882), sec. 93—Benefit of mortgage.*

The Plaintiff sued to enforce his mortgage on certain property by sale, as also, to redeem certain prior incumbrances. The suit was decreed and the Plaintiff was directed to deposit the amount due with respect to the prior incumbrances within six months, and it was ordered that, if he did not do so, he should not be able to redeem. The decree was dated the 31st May 1906. An appeal was lodged by the Defendant or some of them, but it was dismissed. On the 16th April 1907 the Plaintiff deposited the money, and asked that the property covered by the mortgage might be sold free of incumbrances, the prior mortgages having been redeemed by the deposit of the money due upon them. The application was granted on the 14th May 1907.

Thereafter, the Plaintiff applied to have the decree made absolute. This application was contested by the prior incumbrancers. They asked that the order for sale and redemption should be set aside. The Subordinate Judge refused both prayers, made the decree absolute, and confirmed the order for sale and redemption. On appeal the District Judge set aside those orders. The Plaintiff appealed to the High Court and contended



that in the circumstances the orders of the first Court were wrongly set aside by the District Judge.

Defendant No. 3, Respondent, purchased the property in execution of a first mortgagee's decree upon his mortgage. He had a further claim on the property, inasmuch as he also redeemed the mortgage of a second mortgagee, the Plaintiff being the third mortgagee. It was contended that the Defendant No. 3 being a purchaser in execution of the decree on a prior mortgage, and in possession of property, sec. 93 of the Transfer of Property Act, 1872, had no application to his case, and if the section applies, still the fact that the Plaintiff did not deposit the redemption money within 6 months precluded him from obtaining benefit from the decree for redemption.

*Held*—That the principle laid down in sec. 92 of the Transfer of Property Act ought to be followed in such a case.

The position of the Defendant No. 3, who was in possession of the property under an obligation to transfer it, if the money is paid on a fixed date, is far more analogous to that of a mortgagee by conditional sale, than to that of the holder of any other form of mortgage described in the Transfer of Property Act.

The Defendant in a suit for redemption if he seeks to have the Plaintiff's rights finally extinguished, should apply for an order to that effect, and that, if he does not do so, the right should remain in existence.

*Vedaperatti v. Vallabha Valiya Raja* (I. L. R. 25 Mad. 300), *Nandram v. Babaji* (I. L. R. 22 Bom. 771), *Paresh Nath v. Ramjadu* (I. L. R. 16 Cal. 100) applied to.

Here, if a deposit is accepted by the Court before the final order, but after the date fixed for payment, it becomes an effectual deposit. It makes no difference whether the acceptance of such a deposit is or is not preceded by a formal order extending the time.

*Fajjuddi Sardar v. Ashimuddi Biswas* (11 C. W. N. 679), explained.

*Babu Nilmadhub Bose, Mr. P. M. Guha and Babu Hari Bhushan Mukherji* for the Appellant.

*Babu Nalini Ranjan Chatterjee* for the Respondents.

A. T. M.

*Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before CASPERSZ and COKE, JJ. APPEAL FROM APPELLATE DECREE NO. 2 1922 OF 1906. JAGORNATH DUTT AND OTHERS, Defendants, Appellants v. RADHA SUNDER CHOSE, Plaintiff, Respondent. 20th November 1908.

*Marriage contract*—Suit for recovery of money advanced—Second appeal—Sec. 586, C. P. C.

The Plaintiff sued for recovery of Rs. 100 plus Rs. 16 as interest on the allegation that there was

an agreement to marry Plaintiff's daughter with Defendant's son and the prescribed ceremony was performed, and Plaintiff sent Rs. 100 by money-order from Suri (Birbhoom) to the Defendant who are residents of Burdwan District and that subsequently the Defendant broke the contract and the Plaintiff had to marry his daughter elsewhere and he sued the Defendants in the Munsif's Court, Sufi, for recovery of the money advanced. The defence was that the suit was not maintainable in Birbhoom Court as the Defendants were residents of Burdwan District and that the Plaintiff broke the contract and the amount paid had been forfeited. The plaint was first returned to be presented in the Small Cause Court but the District Judge held that the suit was triable by the Munsif and the case was tried in the Munsif's Court at Birbhoom. The lower Courts held that as the marriage was to have been performed at the Plaintiff's place at Birbhoom and the money-order was sent from Birbhoom Court the suit was triable at Birbhoom as the case fell under sec. 17, cls. 2 and 3, C. P. C. On the merits the lower Court also held that as the contract had become void by virtue of the subsequent marriage of Plaintiff's daughter, the Plaintiff was entitled to a refund of the money under sec. 65 read with sec. 56, Contract Act.

The Defendant appealed to the High Court on the ground that the Munsif of Birbhoom had no jurisdiction to try the suit and the money was forfeited.

A preliminary objection was taken by the Respondent that as the Plaintiff sued for money he advanced and not for any compensation, the case was cognizable in the Small Cause Court and the suit was of a Small Cause Court nature and under sec. 586 no second appeal lay in the High Court.

The Appellant said that the question of jurisdiction was tried by the Court below which held that the suit was not triable by the Small Cause Court and the Plaintiff cannot be allowed to take up inconsistent positions and say now that it was cognizable by the Small Cause Courts and that the case was excepted from the Small Cause Court by the Second Schedule, cl. 35 (g) of the Small Cause Courts Act.

*Held*—That the suit being for recovery of amount paid and not for compensation the suit was of Small Cause Court nature and that this Court was not bound by the finding of the District Judge that the suit was not triable by the Small Cause Court and that by virtue of sec. 586, C. P. C., no second appeal lay.

*Babu Nalini Ranjan Chatterjee and Rajendra Nath Chuckerbutty* for the Appellants.

*Babu Kshetra Mohun Sen* for the Respondent.

A. T. M.

*Appeal dismissed with costs.*

# THE Calcutta Weekly Notes.

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### REPORTS (See Index.)

THE INDIAN CRIMINAL LAW AMENDMENT BILL was introduced and passed at the sitting of the Legislative Council of the Government of India on Friday last. The only assuring feature of the Bill consists in the constitution of a special tribunal of three Judges of the High Court to try offences specified in the schedule. This would no doubt to a great extent obviate the objections to trial without the aid of the jury. We must, however, say that the offences specified in the schedule are not confined to anarchical or political offences or offences of an allied nature but seem to go beyond. The provisions as to holding a magisterial enquiry and the recording of evidence behind the back of the accused and the withholding of bail pending further enquiry may lead to the abuse of the procedure at the instance of the police. The amendment of sec. 33 of the Evidence Act is specially objectionable in the portion where it contemplates the admissibility of an approver's evidence recorded by a Magistrate in camera where the High Court may have reasons to believe that the absence of the approver has been caused in the interest of the accused. However unlikely it may be, yet it is imaginable, at least in Mofussil cases, that such absence may also be caused in the interest of the prosecution by the police with a view to avoid not only the cross-examination but even the examination and the public recording of the approver's evidence before the High Court. An approver can never afford to displease the police

and it would be impossible for the accused to prove in such cases that the absence of the approver has been caused by police agency. Regarding Part II, we fully endorse the amendments proposed by Dr. Rash Behari Ghose and regret their rejection.

IN THE CASE OF *Rex v. Baines and another* a very important application for the cancellation of subpoenas against the Prime Minister and the Home Secretary to give evidence at the Leeds Assizes in a criminal case in which certain assassins were charged with rioting, was heard and decided in the King's Bench Division before Mr. Justice Bigham and Mr. Justice Walton. The Attorney-General who appeared on behalf of Mr. Asquith and Mr. Gladstone could not cite any instance of such application having ever been made in any criminal case. Sir W. S. Robson, however, cited two civil cases *Stale v. Savory* (Eng. Weekly Notes, 1891, p. 155) and *Fonton v. Cumberlege Mundell, In re* (52 L. J., Ch., 756) and maintained that the same principle applied to criminal cases and their Lordships assented to that view and held that the Court of King's Bench had jurisdiction to entertain such applications.

THE FACTS OF THE CASE ARE BRIEFLY THESE. A large meeting was held at the Coliseum, Leeds, at which Mr. Asquith and Mr. Gladstone occupied seats in the front row of the platform about 60 feet from two closed doors facing the street. These two doors were about 4 to 5 feet wide and each had two glass panels about a foot wide. The rioting took place in the street. The accused obtained the subpoenas in question on the representation that Mr. Asquith and Mr. Gladstone could give material evidence in the case. Mr. Asquith and Mr. Gladstone filed affidavits with their petition for the cancellation of the subpoenas stating that they were wholly unable to give any evidence which could be relevant to any issue in the case. They further stated that no application had been made to them either by the Respondent or her solicitor for proof of the evidence to be given by them. Their Lordships held that Mr. Asquith and Mr. Gladstone, seated as they were 60 feet from the door, could not have seen or heard anything that was going on in the street through two glass panels

and that therefore the subpoenas had been obtained for indirect purposes, and not *bonâ fide* and should be cancelled.

IT IS TO BE NOTED THAT THEIR LORDSHIPS' decision in the matter was not in the least influenced by the position of Mr. Asquith or Mr. Gladstone. Mr. Justice Bigham observed: "It must not be supposed that the position that Mr. Asquith and Mr. Gladstone occupied afforded them any privilege at all. They stood in the same position as any other of his Majesty's subjects." Mr. Justice Walton also observed "this case must not be taken as a precedent for an imaginary rule that persons summoned on subpoena might, by swearing that they could give no relevant evidence, get the subpoena set aside. Ministers of the Crown had no special privilege. He was not satisfied that the subpoena was *bonâ fide* required for obtaining relevant evidence. Their decision in no way interfered with the power of the Judge at the trial, if anything arose which led him to think that the attendance of these gentlemen was necessary—although it was difficult to see how anything could arise to induce him to think so—to make an order for them to attend."

THE PETITION OF MRS. LOUIE VENUGOPAL CHETTI (*vide* Taylor) has attracted a considerable amount of attention both in England and in this country. The Respondent Mr. Venugopal Chetti is a member of the Indian Civil Service and is said to be a District Judge in the Madras Presidency. The facts of the case are shortly to be these. The Respondent, while he was in England made the acquaintance of the Petitioner at a dancing class in 1887. After the Respondent passed the Indian Civil Service he became engaged to the Petitioner in 1888. The Petitioner was married before the Registrar of Paddington on the 1st of September 1890 and a child was born to them on the 16th of September 1890. The Respondent left England in October of the same year and did neither bring the Petitioner out to India nor see her in England although he went there on furlough. He at first promised to bring her out to India but later on told her that he was going to marry in India again. In fact, however, he did not marry again and continued to make remittances to her though not very regularly yet to the extent of £10 to £16 a month. The wife giving up all hopes of being taken back petitioned for a judicial separation.

WE ARE NOT HERE CONCERNED WITH THE CONDUCT OF THE PARTIES. But we are surprised at the plea taken by the Respondent and the argument advanced by his counsel that he being a Hindu, the

marriage ceremony that he had gone through before the Registrar of Paddington was null and void. His counsel argued that he being a Hindu he could not effect a valid marriage outside his own caste either in India or elsewhere. That the Hindu Law was a personal law and wherever a Hindu went he carried with him that law. The deposition of Sir Bhashyam Aiyengar obtained on commission to the effect that a Hindu could not marry outside his caste either in India or elsewhere was put in support of this proposition and it is no less surprising that Sir James Jardine, K. C., who was examined as an expert on Hindu Law also supported that view.

BUT THE FALLACY OF THE ARGUMENT AS ALSO the inapplicability of the authorities cited above is obvious. It is no doubt true that a Hindu cannot marry outside his own caste according to Hindu Law or Hindu ceremony. But the words italicised make all the difference in the world. If a Hindu marries a Christian or a Mahomedan woman, the Hindu ceases to be a Hindu. Similarly a Hindu may marry in India outside his own caste under the Civil Marriage Act by declaring himself a non-Hindu. If he married a non-Hindu in other countries according to any non-Hindu form of marriage recognised in that country the effect of it on him would be that he would cease to be a Hindu; and not that the marriage would become invalid. After a man has thus ceased to be a Hindu, he will not be permitted by any school of Hindu Law to turn round and declare such a marriage invalid on the ground of his once having been a Hindu. That being the case, the non-Hindu marriage ceremony that he had gone through, if it was sufficient to effect a valid marriage under the law of the country where it took place would stand and could not be repudiated by any rule of Hindu Law.

THE PRESIDENT SIR GORELL BARNES BEFORE whom the matter was argued very rightly told counsel for the Respondent that the whole question before him was what was the effect of the ceremony in England. The learned President relying on recent cases of the type of *Ogden v. Ogden* seemed to be of opinion that the marriage which took place in England was a valid marriage. We have no hesitation in saying that the learned President's view was eminently correct and that the Hindu Law is no bar to his holding that the marriage was valid since the Hindu Law of marriage ceases to have any application to a Hindu taking a non-Hindu spouse. We did not expect that a person holding the office of a District Judge in India after going through a non-Hindu ceremony of marriage would still claim to be a Hindu and under cover of Hindu Law seek to

repudiate such a marriage. Even the commonest Hindu in this country is aware that by the marriage with a non-Hindu he loses caste and ceases to be a Hindu and cannot again contract a valid marriage in accordance with Hindu ceremonies or law of marriage. We are therefore astounded at the statement made by Mr. DeGruyther, K. C., one of the Counsel for the Respondent, "that many Hindus entered into so called marriages with Christian women in England, and the view in India certainly was that such ceremonies were not valid marriages." The learned President interposed saying "Do you mean to say that these Hindus come over here knowing that in their own country these marriages are invalid and yet deliberately enter into such marriages." Mr. DeGruyther replied "I think they do." We most emphatically say that Mr. DeGruyther's statement is neither warranted by Hindu Law nor by facts.

THE HINDU LAW HAS NOTHING TO DO WITH THE validity or invalidity of a marriage of one who has gone outside the pale of Hindu Society and married a non-Hindu woman. The attitude of both the Hindu Society and the Hindu Law is to leave him alone and never to question the validity or otherwise of the non-Hindu marriage. The Hindu Law is intolerant in so far that it would refuse to recognise marriages with non-Hindus, *performed even according to Hindu rites or ceremonies*. But its intolerance ceases there and it would never go out of its way to question the validity of marriages performed according to ceremonies or rites recognised in other countries or known to other religions. The policy of Hindu Law is to maintain an absolute neutrality and observe absolute toleration with regard to such matters and to leave the law governing other communities to have the fullest operation in respect of a person who has married one of them. Every Hindu, whether versed in his own law or not, will admit that this is the right view and policy of the Hindu Law with regard to such marriages. Mr. DeGruyther's statement is therefore utterly unfounded. Facts also show that although many Hindus have been known to marry non-Hindus giving up their society, caste and religion, yet no instance has occurred before this where any such person has attempted to repudiate such marriage on the extraordinary plea that such marriage is invalid according to Hindu Law. We are sure that we express the sense of the Hindu community when we say that they would most strongly condemn any such attempted prostitution of the Hindu Law for such selfish and by no means moral purposes. In the eye of the Hindu Law, of all ties formed on earth that of marriage is the most sacred and absolutely indissoluble and the idea of repudiating a marriage

is utterly revolting to the sense and sentiments of the Hindu community.

THE CASE OF *Surempalli Bangaramma v. Surempalli Brambasi* reported at p. 338 of the current volume of I. L. R. Madras series decides an important question as to the right of maintenance of a Hindu widow out of the estate of her late husband. In this case the Plaintiff brought a suit against the father of her deceased husband for maintenance out of the estate which the father inherited from her late husband. It appears that the Plaintiff after living for 4 or 5 years with her husband after the marriage left the husband and refused to return to him without any sufficient cause. The husband failing to induce her to come to his house married a second wife with whom he lived until his death. The Court of first instance refused her claim on the ground that she had forfeited her right to maintenance by her unreasonable refusal to live with her husband during his life-time. It was however found that the Plaintiff was not guilty of unchastity or any other misconduct of a similar nature. On appeal to the High Court both the learned Judges of the Madras High Court, Wallis, J. and Sankaran Nair, J., by two separate judgments upheld her right to get maintenance out of the properties of her late husband.

THE REASON OF THEIR DECISION WAS THAT THE Plaintiff's right to maintenance was not extinguished by her refusal to live with her husband as long as she was not guilty of unchastity, and that during the life-time of her late husband her right was only suspended as long as she lived away from her husband but her right could have been revived as soon as she returned to her husband. After the death of the husband, her duty to live with him ceased, so the ground on which her right to maintenance was suspended during the life-time of the husband could not stand and therefore her right to the maintenance revived after the death of the husband even though she continued to live in the place where she lived during the life-time of the husband. His Lordship Sankaran Nair, J., observed: "The right of a wife to maintenance is a matter of personal obligation. It rests on the identity arising from the marriage relations and is not dependent on the possession of any property by the husband. He is bound to support her though he should have no property at all. Her home is her husband's house; and if she quits him without any adequate excuse, he is not in law bound to maintain her, obviously for the reason that she thereby disqualifies herself from performing her duties to him. There is no reason therefore why the Plaintiff should not have been entitled to maintenance from the husband on

returning to him or offering to return." The learned Judges, however, having regard to her conduct, fixed her maintenance at a scale less liberal than would otherwise have been the case.

THERE IS NO DOUBT THAT A WIFE IS ENTITLED to maintenance from her husband and after his death from his estate. But can her right to maintenance in no case be forfeited by her misconduct falling short of unchastity? In this case the Plaintiff by her persistent refusal to live with her husband without any justifying cause, led the husband to marry a second wife. The husband was bound to maintain this second wife during his life-time. Now if after the marriage of the husband with the second wife, the Plaintiff offered to return to the husband, would the husband have been bound to take her back and to maintain her? It may, no doubt, be said against the husband that he should have brought a suit for restitution of conjugal rights against the first wife before marrying a second wife. But the husband might well say that he did not care to compel a wife to live with him against her wishes. The same argument which would apply during the life-time of the husband regarding maintenance of a wife who has deserted him ought to hold good even after the death of the husband when the wife seeks to enforce her right to maintenance against the estate left by him.

#### CURRENT INDIAN CASES.

*SUBRAMANIAM v. SUBRAMANIAM*, I. L. R. 31 Mad. 250. *Interest Act (XXXII of 1839).*

Where there was no agreement to pay interest and there was no demand of interest under the Interest Act, held that interest was not claimable.

*THENAPPA v. MURIMUTHU*, I. L. R. 31 Mad. 258 *Mortgage.*

A decree in a suit by a prior mortgagee is to be disregarded in considering the terms of redemption as between the prior and puisne mortgagees. *Umesh Chunder v. Zahur Fatima*, 18 Cal. 164, P.C. followed and explained. The case of *Gongadas v. Jogendra*, 11 C. W. N. 403 seems to apply only to a case in which the prior mortgagee has notice of the subsequent encumbrance and the subsequent encumbrancer has no notice of the prior mortgage; in such a case it may be just to penalize the prior mortgagee for his disregard of the provisions of sec. 85 of the Transfer of Property Act.

*PERIA v. SUBRAMONIAN*, I. L. R. 31 Mad. 261. *Denial of Land-lord's title—Notice.*

The denial of title for the first time in a suit does

not disentitle the tenant to a notice for the reason that the plaintiff is bound to show that at the date of suit he had a complete cause of action.

*SETTAPPA v. MUTHIA*, 31 Mad. 268. *Lis pendens.*

For the purposes of sec. 52 of the Transfer of Property Act the proceedings in appeal must be treated as a continuation of the proceedings in the lower Court.

*THE PUBLIC PROSECUTOR v. RAMASWAMI*, I. L. R. 31 Mad. 271. *Penal Code, sec. 225B.*

If a man legally arrested for an offence gains his liberty before he is delivered by due course of law, he commits the offence of 'escape.'

*ARUNACHELLAM v. EMPEROR*, J. L. R. 31 Mad. 272. *C. Cr. P., secs. 337, 339.*

An accused person who after accepting pardon shews an intention not to give evidence ought still to be examined as a witness in accordance with sec. 337 (2), C. Cr. P., and then dealt with under sec. 339, C. Cr. P.

*GANAPATHI v. EMPEROR*, I. L. R. 31 Mad. 276. *C. Cr. P., sec. 117 (4).*

"Under sec. 117 (4), C. Cr. P., when two or more persons have been associated together in the matter under enquiry, they may be dealt with in the same or separate enquiries as the Magistrate may think fit. Where the parties have been in conflict with one another, I do not think they can be said to have been associated together in the matter under enquiry within the meaning of the section." (Per Wallis, J.)

*ALAGU v. EMPEROR*, I. L. R. 31 Mad. 277. *C. Cr. P., secs. 407, 428.*

A District Magistrate may withdraw even a part-heard appeal from a Subordinate Magistrate and it is not obligatory on the Magistrate to examine witnesses called by the Subordinate Magistrate from whose file the appeal is withdrawn.

*ALUVALA v. EMPEROR*, I. L. R. 31 Mad. 280. *C. Cr. P., secs. 133, 140.*

No notice under sec. 140, C. Cr. P., is necessary for prosecution of a person who does not comply with or protest within the time in regard to an order passed under sec. 133, C. Cr. P.

*ANNIE WILSON v. GEORGE OAKES*, I. L. R. 31 Mad. 283. *Construction of will.*

Sir Arnold White, C. J., observed as follows:—

"In construing the will in question the test we have to apply is what did the testator mean having regard to the words he issued, and in applying this test we must give effect to the principle that technical words or words of known legal import must have their legal effect even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense." Per Lord Davey in *Lalit Mohun Singh Roy v. Chakkun Lal Roy*, 24 Cal. 834 at p. 846.

VENKATA v. VENKATA, I. L. R. 31 Mad. 310.  
*Construction of will.*

In a will the testator gave directions to his wife to adopt and if no adoption was made the testator directed, "if our daughter has a son that boy becomes a *dauhiya* karta." Held that it is not such language as could be interpreted as indicating the testator's intention to revive a dead custom or create a new kind of heir for himself, unknown to the law of the present day.

CHIDAMBARAN v. EMPEROR, I. L. R. 31 Mad. 315.  
*Cr. P. C., sec. 36.*

The effect of sec. 36, C. Cr. P., is not to vest in the District Magistrate the power to arrest and send in custody which is conferred by sub-sec. (3), so as to enable the District Magistrate to make an order of detention under sub-sec. (4).

BHASKARI v. BHASHARAM, I. L. R. 31 Mad. 318.  
*Cr. P. C., sec. 145—Manager of a Hindu joint family.*

A manager of a Hindu family can be protected in his possession by proceedings under sec. 145.

VENKATA v. SURENANI, I. L. R. 31 Mad. 321.  
*Stridhan—Estoppel.*

Where a female heir erected certain buildings on the estate which she inherited, held that the same must devolve as part of the estate although the funds out of which the buildings were constructed were her absolute property inasmuch as the intention appeared to be such from the facts of the case.

If a man obtains possession of land claiming under a deed or will, he cannot afterwards set up another title to the land against the will or deed though it did not operate to pass the land in question, and if he remain in possession till 12 years have elapsed and the title of the testator's heir is extinguished, he cannot claim by possession an interest in the property different from that which he would have taken if the property had passed by the will or deed.

EKAMBARA v. MUNISWAMY, I. L. R. 31 Mad. 348.  
*Land Acquisition Act—Costs—Appeal.*

An award of costs is appealable under the Land Acquisition Act. Pleaders' fees were allowed according to the scale laid down.

NAGARARA v. TANGATUR, I. L. R. 31 Mad. 330.  
*C. P. C., sec. 545—Transfer of Property Act, s. 39.*

A security bond under sec. 545, C. P. C., by an Appellant enabling the other side to sell the property for the decretal debt is a mortgage and, if unregistered, is invalid under sec. 59 of the Transfer of Property Act.

POANUSAMI v. SRINIVASA, I. L. R. 31 Mad. 339.  
*Mortgage—Release of portion—Suit—Parties.*

Where other persons are interested in a portion of the mortgaged property, the mortgagee cannot by releasing another portion claim to recover the whole money by proceeding against the portion in which the other persons are interested.

If all the persons interested in the mortgaged property are not made parties and no relief is asked against them the suit cannot be dismissed.

SAMOO PATTAR v. ABDUL SAMMAD, I. L. R. 31 Mad. 397.  
*Charge—Mortgage.*

A charge cannot be created by an unregistered mortgage bond of which registration is compulsory.

SURAMPALLI v. SURAMPALLI, I. L. R. 31 Mad. 339.  
*Husband and wife—Maintenance.*

"It is undoubtedly the duty of a Hindu wife to live with her husband and under his protection; and if, without cause, she leaves his protection, as apart she cannot claim to be maintained by him. There is, however, no authority for saying that after leaving him she has no right to return and live under his protection." So, that on the death of the husband, when the obligation of the widow to reside in the husband's house ceased, the father of the husband who inherited his estate would be bound to give her maintenance out of the estate.

VALLARKONDU v. MALUPEDDI, I. L. R. 31 Mad. 343.  
*Partnership.*

Suit by one partner against two others upon a promissory note given by them in repayment of an advance. Held that such a suit is maintainable and that a suit for dissolution of partnership is not necessary for this purpose.

ACHUTHAYYA v. THIMMAYYA, I. L. R. 31 Mad. 345.  
*C. P. C., sec. 521.*

Where an award was set aside and the case was decided on the merits, held that on appeal the Appellate Court may enquire into the propriety of the order of the first Court setting aside the award.

## Reviews.

THE LAWS OF ENGLAND. Being a complete Statement of the whole Law of England. *By the Right Honourable the Earl of Halsbury and other lawyers, Vol. III. London, Butterworth & Co. 11 and 12 Bell Yard, Temple Bar. Law Publishers. 1908.*

The appearance of the present volume shows that the great work undertaken by some of the most eminent English lawyers of the present day under the supervision of Lord Halsbury is not lying idle. The titles dealt with in this volume are Bills of sale; Bonds; Boundaries, Fences and Partywalls; Building contracts, Engineers, and Architects; Building Societies; Burial and Cremation. It is with the law discussed under the second and the third titles that lawyers in India may be said to have any practical concern. The former is contributed by Sir Edward Carson, K. C. and Mr. William Bowstead, and the latter by Messrs. Cecil A. Hunt and Linton T. Thorpe, Barristers-at-law. Both articles are marked by judicious classification of the subject-matter and lucidity of expression and enunciation. As in previous volumes, propositions of a more or less general character find place in the body of the work, whilst matters of special interest or decisions of a doubtful character are noticed in the footnotes. The title "Bond" deals with bonds in general, and will be found useful to Indian lawyers. Such questions, for instance, as "Estoppel by recitals in bonds," "Joint, several, and joint, and several bonds," "Amount recoverable on breach of condition," "Alteration in bonds," frequently arise in this country and are decided upon the same general principles as obtained in England. The subject, "Boundaries, fences and partywalls," is of special interest as it is one which up till now has not received the exclusive treatment it has here. We select at random some of the sub-headings under this title which may be of interest to Indian lawyers. One is "Boundaries fixed by legal presumption." Under this heading after dealing with the "Nature of the presumption" the subject is considered in relation to the following topics: Seashore, Lakes, Rivers, Highways and Private ways, Railways and Ditches. Another heading is "Trees on or near Boundaries." A third, "Dangerous Fences." "Partywalls" receive separate treatment. Not the least important of them is "Evidence of Boundaries." In the treatment of the subject of alluvial accretions, we meet with our old friend, *Lopez v. Muddun Mohun*, 13 Moo. I. A. 467 and the recent case of *Ripthj v. Sarfaraj*, 9 C. W. N. 889. Thus it would seem that India does contribute to the development of the law of England, and the indebtedness in the matter is not entirely one-sided. To say that the authors of these volumes are carrying on a

noble work in the interest not merely of England but of the whole empire is only doing them bare justice.

THE CODE OF CIVIL PROCEDURE (Act V of 1908). *By Hara Kumar Mitra, Vakil, High Court, Calcutta, and Sarat Kumar Mitra, Vakil, High Court, Calcutta, with Critical and Explanatory Notes by the Hon'ble Mr. Justice Savada Charan Mitra. Published by Dash & Co. 1908.*

This little book will be a great help to the study of the New Code of Civil Procedure. The differences between the Old and New Code have been carefully pointed out and its treatment is novel. The orders and rules which are in the New Code set out in the Schedule and not in the body of the New Code, have in this book been arranged under the different sections to which they relate. This re-arrangement of the New Code on the old lines will be a great convenience for those familiar with the Old Code in their study of the new, though we doubt whether they will be equally convenient for practice. The preface and some critical and explanatory notes have been supplied by the Hon'ble Mr. Justice Mitra. There are also references to some of the leading cases bearing upon the subject. The price of the book is very moderate, and the book itself is of a convenient size. Altogether it is a very useful publication.

## Notes of Cases.

### CALCUTTA HIGH COURT.

#### Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL APPELLATE JURISDICTION. Before MACLEAN, C. J. and CARNDUFF, J. CRIMINAL APPEAL No. 654 OF 1908. ABDUL FAZIL, Appellant, v. THE KING EMPEROR. 17th November 1908.

*Murder unpremeditated—Grave and sudden provocation—Indian Penal Code, secs. 300 and 302—Sentence—Ground for mitigation.*

There was a dispute over a right to a certain pathway between one Fazil Munshi and the accused Nur Bux and Abdul Fazil who were father and son. On the day of occurrence, May 5th, Abdul Fazil and his younger brother were making holes for putting up a fence across the pathway. Nur Bux, the other accused, was standing by and directing the operations. Fazil went there and remonstrated and an altercation took place between Nur Bux and Fazil, Nur Bux in the heat of the moment said "Lagou" (beat) on which Abdul Fazil struck Abdul Munshi over the head with an "Ucchi" (a pole with a sharpened end for making



holes), Fazil Munshi reeled. Then Nur Bux struck him on the forehead with a goad and the younger brother of Abdul Fazil also struck him with another "Ucchi" on the waist. Fazil Munshi then fell to the ground; he was then taken to the hospital where he died the same night.

The accused Abdul Fazil was found guilty under sec. 302, I. P. C. and was sentenced to transportation for life by the Sessions Judge. The other accused Nur Bux the father was found not guilty and acquitted. On appeal to the High Court it was urged on behalf of the Appellant that he acted under grave and sudden provocation and therefore his offence was that of committing culpable homicide not amounting to murder.

Their Lordships observed:—

"But it is suggested for the Appellant that he did the act complained of—an act which has deprived the deceased of his life—whilst he was deprived of the power of self-control by grave and sudden provocation, &c. . . . We think that the view taken by the Judge on this point was correct and that we should be straining the language of the Code and going contrary to many authorities if we were to say that, upon the facts in this case, the Appellant was deprived of the power of self-control by grave and sudden provocation. It is, therefore, not a case in which this Court can properly interfere. But inasmuch as the act by the Appellant which caused the death of the deceased appears to have been quite unpremeditated, it may be a case in which the Government might be disposed to show some clemency and to consider favourably any application for some reduction of the sentence."

*Moulvi Shamsul. Huda* for the Appellant.

B. C. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before BRETT and SHARFUDDIN JJ. APPEAL FROM APPELLATE DECREE No. 1198 OF 1907. BENI PROSAD, decree-holder, Appellant, v. RAM CHANDRA SING, Judgment-debtor, Respondent. 18th November 1908.

*Appeal—Court fee payable when mesne profits not ascertained—Period for which mesne profits available.*

Plaintiff sued for recovery of possession and got a decree. He executed his decree and obtained possession on the 26th March 1906. He then prayed for ascertainment of mesne profits. The decree executed only stated that the mesne profits should be ascertained on execution but did not state from which period the Plaintiff was entitled to mesne profits and up to which period. The lower Courts relying on the case in I. L. R. 5 Cal. 563 gave Plaintiff mesne profits up to the date of suit. The Plaintiff appealed to High Court and paid full Court-fees on the memorandum of appeal as

in the original suit and described the appeal as an appeal from appellate decree.

*Held* (Upon the report of the Deputy Registrar to whom the matter was referred)—That as the mesne profit had not yet been ascertained the Court-fees payable was Rs. 2 only and not *ad valorem* as the appeal was an appeal from order. Held, further, that under the Privy Council ruling reported in I. L. R. 8 Cal. 78 the Plaintiff was entitled to mesne profits up to date of delivery of possession.

*Babus Umakali Mukerjee and Raghunath Sing* for the Appellants.

*Babus Jogesh Chandra Roy and Khetra Mohan Sen* for the Respondent.

A. T. M.

CIVIL APPELLATE JURISDICTION. Before MITRA and CHITTY, JJ. APPEAL FROM APPELLATE DECREE No. 422 OF 1907. DEBENDRA NATH GHOSE, Plaintiff, Appellant, v. SHEIKH ESHA HUQ MISTRI, Defendant, Respondent. 9th November 1908.

*Limitation Act (XV of 1877) Sch. II, Art. 10—Principal and agent—Accounts, suit for.*

The appeal was in a suit for accounts brought by the principal against his agent. The Plaintiff was the *seputnidar* of a village, the Defendant was his collection agent and served as such from the beginning of the year 1301 to 3rd Agrahan 1309. On the latter date, he was dismissed. The account was sought for the entire period from 1301 to 1309.

One of the pleas raised in the defence was whether the suit, so far as it covered the period beyond three years from the institution, was barred by limitation. Both the lower Courts gave effect to this plea. As regards the period within the 3 years the Munsif held that the Defendant was not liable to pay any money on account of that period.

*Held*—That there was nothing in the contract between the parties which should take away the case from the operation of the three years' rule of limitation as prescribed by Art. 89, Sch. II of the Limitation Act.

*Jogendra Nath Roy v. Deb Nath Chatterjee* (8 C. W. N. 113) and *Shib Chunder Roy v. Chandra Narain Mukerjee* (I. L. R. 32 Cal. 719) followed.

*Matilal Bose v. Amin Chunder Chattopadhyaya* (I C. L. J. 211) distinguished.

*Babu Soroshi Churn Mitra* for the Appellant.

No one appeared for the Respondent.

A. T. M.

*Appeal allowed.*



CIVIL APPELLATE JURISDICTION. Before, MITRA and CHITTY JJ. APPEAL FROM APPELLATE DECREE No. 444 OF 1907. GOSTO BHARI GHOSH AND ANOTHER, Plaintiffs, Appellants v. SRIMATI ROHINI GOWALINI, Defendant, Respondent. 10th November 1908.

*Sale-deed—Registration—Consideration, passing of—Intention.*

The appeal was in a suit for ejectment. The Plaintiffs claimed title as legal representatives under the Hindu Law of inheritance of one Kailash. The Defendant was a concubine of Kailash who claimed title by virtue of a *kobala* executed by Kailash.

Both the lower Courts found that the *kobala* was genuine. The Munsif, however, held that no consideration passed and that the transaction evidenced by the *kobala* was a paper transaction, which was probably brought about by the importunities of Kailash's mistress.

The Subordinate Judge did not come to any distinct finding whether consideration passed or not, but the consideration stated in the document was only Rs. 49. He was of opinion that the *kobala* which was registered was sufficient to pass the ownership of the property covered by it to the vendor.

*Held*—That the mere registration of a deed of transfer was not sufficient in itself to convey title.

*Mouladan v. Raghu Nandan Prishad Singh* (I. L. R. 27 Cal. 7) referred to.

What the Court has to see is what was the intention of the vendor, if no consideration passed. The intention may be presumed from circumstances.

*Lala Acharya v. Raja Karam Hussain Khan* (9 C. W. N. 477; s. C. L. R. 32 I. A. 113) referred to.

*Babu Hemendra Nath Sen* for the Appellants.

*Babu Golap Chunder Sarkar* for the Respondent.

A. T. M.

*Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before MITRA and CHITTY JJ. APPEAL FROM APPELLATE DECREE No. 2153 OF 1907. HARI CHARAN BHATTACHARYA, Plaintiff, Appellant v. JADU NATH BANERJI AND OTHERS, Defendants, Respondents. 11 November 1908.

*Civil Procedure Code (XIV of 1882), sec. 44—Causes of action, joinder of—Multifariousness.*

The appeal was in a suit for recovery of possession of a plot of land and for declaration of a right of way enjoyed by the public with respect to another plot of land. The Plaintiff claimed both the reliefs. The Defendant did not claim under separate rights and they jointly resisted the Plaintiff with respect to the reliefs claimed.

*Held*—That the causes of action were different; but the Code of Civil Procedure permits joinder of causes of action by the same person or persons against the same person or persons. All that the Court requires under sec. 44 of the Code of Civil Procedure, is that, if there are two causes of action and the relief asked with respect to one is a declaration of right to immoveable property and with respect to the other a claim of a different character, permission of the Court should be taken for the joinder of the two causes of actions.

The suit was not bad for multifariousness.

*Mr. Caspeiss* and *Babu Brojo Lal Chuckerbutty* for the Appellant.

*Babu Troylucko Nath Chuckerbutty* for the Respondent.

A. T. M.

*Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before MITRA and CHITTY JJ. APPEAL FROM ORDER No. 524 of 1907. SRIMATI HARI BADANI DASIA AND ANOTHER, Decree-holders, Appellants v. GOBINDA CHANDRA DAS AND OTHERS, Judgment-debtors, Respondents. 13th November 1908.

*Execution, application for—Executors not taking probate—Step in aid of execution.*

A decree was passed on the 23rd May 1908. Applications for executions were made several times and the final application was made on the 16th April 1904. That application was made by the executors of the original decree-holder, though probate had not then been obtained. The application was rejected by the Court below.

*Held*—That the application was in form a proper application and, at all events, it was a step taken in aid of execution. The mere fact that one of the applicants had not obtained probate would not justify a Court in rejecting the application.

*Hafizuddin Chowdhury v. Abdul Aziz* (I. L. R. 20 Cal. 755) referred to.

*Babu Rajendra Chunder Guha* for the Appellants.

No one appeared for the Respondents.

A. T. M.

*Appeal allowed.*

*Case remanded.*

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AS USUAL THERE WILL BE NO ISSUE OF THIS journal during the Christmas holidays. The next number will be issued on Monday, 4th January next.

WE UNDERSTAND THAT HIS EXCELLENCY THE Viceroy will open the new wing of the High Court building on Saturday, the 9th of January 1909.

WHEN MR. JUSTICE SARADA CHARAN MITRA WAS raised to the Bench we welcomed the appointment but, as usual, we reserved our opinion of him till he retired from the Bench. He had a brilliant University career, perhaps more brilliant than that of any other Indian Judge of the Calcutta High Court, a leading practice amongst his contemporaries of the Vakeel Bar; but throughout his career at the Bar he appeared to be of a quiet and unostentatious disposition. Every one was conscious of his ability but ability alone does not always make a judge an assured success on the Bench. Tact, judgment, a never failing sense of fairness, an honest independence (which is but a counterpart of the conscientious regard for one's duty) industry and expedition in the dispensation of justice, if these are the qualities that go to raise a judge in public esteem, we have no hesitation in saying that Mr. Justice Sarada Charan Mitra has fulfilled in every respect all that could have been expected of him by the profession and the public at large. Those who can view his work as a Criminal Judge without prejudice

and passion will admit that he always held the balance of justice evenly between two opposing currents of public opinion even in *quasi* political cases and gave his decisions on the merits of the cases before him, in strict accordance with the law, unmoved by any other considerations than those of doing justice. His decisions on the *Swaraj* and *Swordstick* cases, which have been assailed by critics from the very opposite points of view, would fully bear out the justice of our remarks. His mastery over the facts and the law in civil cases has also been a matter of general admiration. It is certainly not too much to say of him that seldom has a judge been known to grasp the facts of complicated cases more quickly and dispose of them more readily. This is the second instance where the hard and fast adherence to the sixty years' rule has cut short the valued career of an Indian judge. The retiring judge carries with him the good wishes and esteem of the profession and we are sure that a biographical sketch of his career which appears in another column will interest our readers.

WE CORDIALLY WELCOME LORD MORLEY'S REFORM scheme. The reforms foreshadowed in the momentous announcements made simultaneously in the House of Lords and by the Government of India on the 17th instant promise to lay the foundation of a constitutional Government in India. The proposal to recast the Provincial Councils in such a manner as to secure in these Councils a non-official majority is a distinct advance towards representative form of government. The recognition of the principle that election should supplant the present system of government nomination to represent minority interests also marks a step forward in the right direction. We have on more than one occasion protested in these columns against the practice of allowing voluntary associations (such as Landholders' and Mahomedan Associations) the privilege of electing representatives for the Provincial Legislature. We note with pleasure, therefore, that the scheme suggests the setting up of electoral colleges for class representation and the making of provisions for minority representation on thoroughly scientific lines. We would suggest that the representation of trade and commerce should also be secured through electoral colleges founded on similar lines. The right of non-official members.

to put supplementary questions is also an important concession and is bound to make the executive element in the Government more accountable to popular representatives. The widening of the scope of the local Legislatures for the discussion of administrative and financial measures is also bound to increase the responsibility of the executive to popular representatives. No less important are the proposals for freeing the local bodies, such as the Municipalities, the District and the Local Boards, from executive control and placing them under a sympathetic Local Government Board. Much will however depend upon the constitution of this Board. It is very remarkable that the idea of instilling a new life in the village communities and founding a system of self-government by treating them as so many units, which has been uppermost in the minds of many thoughtful men in India, should also find a place in this scheme. We must observe in this connection that to make such a scheme of local self-government useful in removing the sanitary and economic wants of the people, rural education should march hand in hand with rural self-government. The scheme as outlined on the whole reads attractive but care should be taken to give a comprehensive statutory expression to it and to leave as little as possible to rule-making agencies in giving it the final shape.

WE INVITE SPECIAL ATTENTION TO THE FOLLOWING appeal to the people of India and their leaders made by His Excellency Lord Minto at the close of the proceedings of the Viceroy's Legislative Council on Friday last.

I hope that we may assume that we are about to enter upon a new administrative era, based upon a recognition of the advance of political thought and the justness of many political ambitions. I hope that with the dawn of this new era, the recollection of the dark days through which we have been passing may disappear. The future is largely in the hands of the people of India and their leaders—it rests with the latter to assist us to dispel the results of anarchical political fanaticism, it rests with the people themselves to welcome an honest attempt to ameliorate the administration of their country. It is to the leaders of Indian political aims and to the people of India whose aspirations they direct that we must look for that support which can alone secure the success of the reforms we are about to inaugurate.

We consider it to be the patriotic duty of every member of the Indian community not only to reciprocate this earnest and truly statesmanlike appeal but also to co-operate with the Government for the consummation of the promised reform. Every member of the educated community should therefore exert all the influence that he can command to convince his neighbours that self-government will never be a success without the practice of individual self-control. We would not confine our

appeal to any particular class or section but would earnestly appeal to all alike that all acts of lawlessness and violence should cease on all sides in the interest of the peaceful progress of the people and also that of good government.

THE ENGLISH *Law Journal* OF THE 28TH NOVEMBER last says in a paragraph entitled "An Unknown Statute" that the case of *Chetti v. Ghetti* was entered in the list of judgments on Monday, the 23rd of November. At the sitting of the Court the learned President, addressing counsel engaged in the case, said that in the course of the hearing reference had been made to a statute governing the customs of Hindus in India, but that he had been unable to find it and our contemporary goes on to remark that this important judgment had to be held over until the learned judge had had time to consider the provisions of the statute which apparently was unknown even to counsel engaged in the case. We presume that the Indian statutes referred to are some early Regulations and some later provincial enactments (the Civil Courts Acts) which provide that in administering Hindu law, Courts are to give effect to well established customs. But these Indian statutes had no application to the case before the learned President since the marriage in question could not be, as we have explained in our last issue, in any sense governed or affected by Hindu law, customs or usages.

IF THE LEARNED PRESIDENT HAD ONLY CONSULTED Sir Arthur Wilson with regard to the points of Hindu law raised before him during argument, he would have been saved a great deal of unnecessary trouble with regard to this case. The learned President might also with advantage have consulted on this point the recent work on "Hindu Family Law" by Mr. Trevelyan. In this work the author after stating that in administering Hindu law the Courts are required to give effect to a custom, goes on to mention that in the following enactments this principle has been recognised by the Legislature:—

Bengal Reg. IV of 1827, sec. 26; Madras Civil Courts Act (III of 1893), sec. 16; Lower Burma Courts Act (XI of 1889), sec. 4; Central Provinces Laws Act (XX of 1875), sec. 5; Oudh Laws Act (XVIII of 1876), sec. 3; Punjab Laws Act (IV of 1872), sec. 5 as amended by Act XII of 1878, sec. 1.

We may refer also to the Bengal, N. W. P., and Assam Civil Courts Acts, sec. 37, cl. (1). We suppose, however, that it has not been necessary for the learned President to consult the above-named Indian statutes. For in this case there was no occasion for his Lordship to administer the Hindu Law as the marriage in question was altogether outside the scope of such law.

THE *Law Journal* IN ITS LAST ISSUE MAKES THE following observations under the very appropriate heading of "punishment before conviction."

Mr. Justice Bucknill ought to return from his circuit journeyings with a strong belief that the circuit system is in urgent need of reform. Two prisoners have appeared before him within the past few days, one at Bristol and the other at Carmarthen, who had been in prison four months awaiting trial, and in each case the prisoner was set free. In the Carmarthen case, in which the prisoner was accused of sacrilege, the learned judge is reported as saying that 'he was almost horrified to find that the prisoner had been incarcerated for four months awaiting trial for such a trivial theft. Even if the prisoner had been found guilty, he would not have passed a sentence of more than three months.' The long detention of untried prisoners is an old story, but the neglect of the authorities to provide a remedy for so scandalous a defect in the administration of the criminal law makes it desirable to draw pointed attention to it. The Lord Chancellor was urged to bring about the establishment of the Court of Criminal Appeal by repeated comments on alleged miscarriage of justice. Is it not anomalous that a prisoner who is sentenced to four months' imprisonment may have his conviction reviewed by the Court of Criminal Appeal, while a prisoner who suffers four months' imprisonment before he is found to be innocent is without any redress? So serious and patent an evil ought to induce the powers that be to undertake that thorough reform of the circuit system which has so long been overdue.

#### MR. JUSTICE SARADA CHARAN MITRA.

Mr. Justice Sarada Charan Mitra, who retired from the Bench of the Calcutta High Court, under the sixty years' rule, on the 18th instant, is like most of his Indian predecessors on the Bench, essentially a self-made man. He was born at Panisahola in the Hughly District in Bengal in the year 1848. His father, Eshan Chandra Mitra, was a Banian of Calcutta. Mr. Mitra lost both parents while still quite young. He was admitted to the Colootollah Branch School, now known as the Hare School, in 1857. In the year 1865, he was the first on the list of successful candidates for the Entrance Examination at the Calcutta University, after which he continued his studies at the Presidency College, Calcutta. He also stood first on the list of successful candidates at the first Examination in Arts in the year 1867, and was the Duff Scholar in Mathematics of that year. In 1870 Mr. Mitra again headed the list of successful candidates in the examination for the Degree of Bachelor of Arts and secured the Eshan scholarship. Within a month he passed third on the list of successful candidates at the examination for the Degree of Master of Arts. In 1871 he carried off the Prem Chand Roy Chand scholarship, which is the highest prize obtainable at the Calcutta University. He began life as a Lecturer of the English language at the Presidency College. In 1873, having obtained the Degree of Bachelor of Law, he was enrolled as Vakeel of the Calcutta High Court.

There was a very brilliant set of barristers and

vakeels practising in the Appellate Side of the High Court when his early struggles at the vakeel Bar commenced. But by his quick intelligence and thorough grasp of the principles of law and power of exposition he made his way in the profession and finally came to the very front rank of it. The profession of law did not, however, absorb his whole attention and he always took pleasure in devoting his time and talents in other useful spheres of work. In 1884 he was nominated a member of the Central Text Book Committee of which he proved a very active member and his opinions in this connection were always much valued by his colleagues. In 1885 he was nominated a Fellow of the Calcutta University, in which capacity he was of great service on the Sanskrit Board and in the Law Faculty. At this time he established the first Hindu boarding institution named Calcutta Aryan Institution. In 1895 he was appointed Tagore Law Lecturer. He undertook to deliver a course of lectures on the Land Law of Bengal and his lectures as published in book form are a useful contribution on the subject. In 1898-99, 1899-1900 and 1901-1902 he represented the Law Faculty in the Syndicate of the Calcutta University. In 1901 and 1904 he was elected as the President of the Law Faculty. In 1902 and again in 1903 he officiated as Judge of the High Court at Calcutta. At this period he was appointed by the Bengal Government to report on the Budh-Gya dispute, which was both a compliment and an expression of the confidence reposed in him by Government. Mr. Mitra's report was much appreciated by the then Lieutenant-Governor Sir J. Bourdillon who described it as "a monument of erudition, moderation, impartiality and carefulness." In the year 1904 Mr. Mitra, who had already officiated with credit as a Judge, was given the substantive appointment on the retirement from the Bench of Sir Gooroo Das Banerjee. Mr. Justice Mitra had by this time established a reputation for ability, and his appointment was welcomed by all sections of public opinion.

He has from the very first been a man of advanced views and progressive ideas in the Hindu community, and at an early period of his life he joined Pundit Iswar Chandra Vidyasagar in the work of promoting sanction for the remarriage of Hindu widows, and was in fact the Secretary of the Widow Re-marriage Society. The spirit of social reform did not cool down in him as it does with many with advancing age. By the marriage of one of his sons not many years ago he showed the way to the fusion of the sub-castes of the Kayastha community of which he is a prominent member.

We have already said that Mr. Justice Mitra is a man of many sided activity and his contributions to the literature of the day cover a very wide field. He has contributed from time

to time many interesting articles to the Bengali and English periodicals on a variety of subjects. His Note on "A Uniform Script for India" was received with great interest all over India. Among his other contributions, that on The Development of the Bengal School of Hindu Law has been noticed in these columns. He has also written on University Reform, on Primary Education, on Female Education, and on the appointment of Examiners in the Calcutta University, and his contributions like his judicial pronouncements have been marked by a balance of judgment, a due sense of proportion and that regard for practical requirements which always commands respectful hearing. Amongst his works of a purely literary character, his edition of Vidyapati's Padabali and his Kayastha Karika are deserving of special mention.

As regards his judicial pronouncements, no lengthy notice is necessary as they are still fresh in public memory. His most valuable contributions have been in the province of the law of land tenures. Of these we need only mention the cases of *Pundit Lachmi Narayan v. Sheikh Mazhar*, 12 C. W. N. 650 and *Ajatulla Bhuyan v. Chandra Mohan*, 12 C. W. N. 285, in which the principles upon which mesne profits in respect of *khamar* or *zerait* lands are to be assessed have been reviewed, the case of *Ram Sundar Shaha v. Secretary of State*, 11 C. W. N. 928, in which the peculiar incidents of certain *noabad* taluks of the Chittagong district are discussed, the case of *Rameshwar Singh v. The Secretary of State*, 11 C. W. N. 448, where the history of *malikana* and *dasturat* grants of Behar is reviewed with remarkable power and insight. His dissentient judgment in the Full Bench case of *Pundit Lachmi Narayan v. Sheikh Mazhar*, 11 C. W. N. 626, in which the question was whether the rights of a non-occupancy raiyat are heritable, is an instance of close reasoning and displays his knowledge of the history of the law of landlords and tenants of this province. His judgment in the case of *Debendra Nath Dutt v. Administrator-General*, 10 C. W. N. 673, has been recently affirmed by the Privy Council.

Mr. Justice Mitra has always been for adopting broad and common sense views on questions of Hindu Law. The case of *Akhay Chandra Bhattacharya v. Hari Das Goswami*, 12 C. W. N. 511, is an instance in point, where he has boldly asserted the view that spiritual benefit is not always the guiding principle of inheritance under the Bengal School of Hindu Law.

It is however in connection with his work on the Criminal Bench that his name has been most frequently to the fore in recent years. His definition of *swaraj* in the case of *Veni Bhusan Ray v. Emperor*, 11 C. W. N. 1050, is still fresh in the minds of the public. His judgments in the

*Bande Mataram* sedition case, setting aside proceedings under sec. 517, C. Cr. P., for the confiscation of the press (*Abinash Chandra Bhattacharji v. The Emperor*, 11 C. W. N. 1046), and in the *Swordstick* case (*Dy. Legal Remembrancer v. Satish Chandra Roy*, 11 C. W. N. 971) have been commented on from quite different standpoints, but the soundness of the conclusions arrived at in all these cases cannot reasonably be questioned. His judgments on the rights of under-trial prisoners to be admitted to bail as laid down in *Fohurmull's* case, 10 C. W. N. 1093, and in the recent Midnapur conspiracy case (*Famini Mullik v. The King-Emperor*, 13 C. W. N. 51), will take rank as leading cases on the subject.

### CURRENT INDIAN CASES.

ICHARAN SINGH *v.* NILMONEY, I. L. R. 35 Cal. 470. *Central Provinces Tenancy Act.*

The transfer of an occupancy holding is voidable at the instance of the landlord, whether the transfer is of a part or of the whole. A person can claim tenancy and in the alternative a limited interest in the same.

CHANDRA NATH *v.* KALI PRASANNA, I. L. R. 35 Cal. 536. *Appeal—Dismissal for default.*

Memorandum of appeal registered on the 28th July; 10 days' time for putting in tullubana; appeal fixed for hearing for the first September; the appeal was dismissed for not putting in the tullubana within the time (although it had been put in after the time); the appeal was dismissed on the 18th August. *Held*, that the appeal ought not to have been dismissed before the date fixed for hearing without ascertaining that the notice to the Respondents could not have been served by the date fixed for hearing.

JADU LAL SAHU *v.* JANKI KOER, I. L. R. 35 Cal. 575. *Pre-emption—Champanan—Ceremonies.*

As to the existence of the law of pre-emption among Hindus in the district of Champanan and to its having been judicially recognised there can be no reasonable ground for doubt.

Before it can be held that the sale was complete there must have been a cessation of the vendor's right in the property.

Discussion as to what ceremonies are necessary.

DUNNE *v.* DHARANI KANT, I. L. R. 35 Cal. 629. *Survey Map.*

Statements of zemindars or their agents contained in Thakbust maps may amount to admissions that the land belonged to one village or the other. Such admission must be greatly relied on as they were made at a time when there was no dispute regarding boundaries.

MAHARAJ BAHADUR *v.* FORBES, I. L. R. 35 Cal. 737. *Bengal Tenancy Act, sec. 65—Rent decree by an outgoing landlord.*

A decree obtained by an outgoing landlord is a decree for rent within the meaning of sec. 65 of the Bengal Tenancy Act.

ASIATIC STEAM NAVIGATION COMPANY *v.* BENGAL COAL COMPANY, I. L. R. 35 Cal. 751. *Evidence—Deposition—Conduct.*

"It has no doubt been held that statements made in a party's presence during a trial are not generally receivable against him merely on the ground that he does not deny them, because the regularity of the judicial proceedings prevents the free interposition permitted in ordinary conversation. However, cases may occur in which the refusal of a party to reject a charge made in a Court of Justice or to cross-examine or contradict a witness, or to reply to an affidavit, may afford a strong presumption that the imputations made against him are correct."

ABDUL *v.* SATYA, I. L. R. 35 Cal. 767. *Transfer of Property Act, sec. 90—Ex parte decree—Inherent power of Court to set it aside—Succession certificate.*

There is an inherent jurisdiction in the Court to set aside an *ex parte* decree under sec. 90 of the Transfer of Property Act. A decree can only be passed under sec. 90 against a defendant from whom the balance is legally recoverable. The Court cannot pass any decree under sec. 90 without a succession certificate.

ESHAN CHANDRA *v.* NILMONI, I. L. R. 35 Cal. 857. *Easement—Acquisition of the right.*

A person can acquire an easement apart from the mode of acquisition mentioned in sec. 26 of the Limitation Act; if a person relies on custom he must prove that it was ancient, continuous, peaceable, reasonable and certain. The proof of a customary easement is immensely more difficult than proof of an easement under sec. 26 of the Limitation Act.

PRAYAG RAJ *v.* SIDHU, I. L. R. 35 Cal. 877. *Execution sale—Right of purchaser.*

A purchaser in execution of a decree for money purchases only the right, title and interest of the judgment-debtor and is bound by a mortgage which was not executed by the judgment-debtor but liability under which the judgment-debtor was in equity estopped from denying.

BRINDABAN *v.* BHAWANI, I. L. R. 35 Cal. 931. *Revenue Sale Law, sec. 37.*

Sec. 37 of Act XI of 1859 does not avoid allow the avoidance of encumbrances of every kind nor does it allow the purchaser to assess rent at a rate higher than that paid from before the Permanent

Settlement, notwithstanding that no rent was levied for long series of years.

The incumbrances created by the laches of the defaulters or the actions of their predecessors are not binding on the purchaser.

### Reviews.

THE INDIAN EVIDENCE ACT, No. I of 1872, together with an Introduction and Explanatory notes, Rulings of the Courts and Index. By Sir Henry Stewart Cunningham, K. C. I. E., M. A. Eleventh Edition, edited by Sir Horatio Hale Shephard, M. A., LL. D. Madras. Higginbotham & Co. 1908. Price Rs. 12.

The first edition of the work appeared shortly after the Evidence Act was passed. The notes in the first edition professed only to explain the connection of "one section with another, to clear up any obscurities of expression and to point out the respects in which the present measure differs from the English Common Law or from that previously in force in Indian Courts." It was not then anticipated that this Act (recognised from the beginning as a masterpiece of legislation) would require elaborate commentaries and all that the author then hoped for his notes was that they might render assistance to those who for the first time take up the study of the Law of Evidence, in mastering it. The Act has now been tested in the Courts of law for over thirty-five years and has stood that test as well as any piece of legislation in this country or in England. But it has not done away with the need for commentaries. No statute has. And some of the ablest commentaries on Indian Statutes are those dealing with this Act.

The present work has somewhat outgrown its original scope as above indicated. The provisions of the Act have been subjected to interpretation by the High Courts through a long series of years, and these interpretations have found their way into the notes in successive editions. But the case notes have been carefully selected and the original object of the work, *viz.* to assist students in mastering the principles of the law of evidence has been always kept in view. It is still one of the best aids to the study of the Evidence Act and students and practitioners would alike profit by its study. The number of cases noted in the present edition is about 800.

The Act without the notes is separately printed at the commencement of the work for convenience of reference. But as the notes are not elaborate and the book not at all voluminous, the necessity for this arrangement is not obvious. In the appendices are given the speech of Mr. (afterwards Sir James Fitzjames) Stephen on presenting the report of the Select Committee on the Bill to define and amend the Law of Evidence, and certain statutes, Indian and English, connected with the law of

evidence. The book is handy and the ~~get~~ up excellent.

**THE INDIAN PRACTICE.** A Commentary on the Code of Civil Procedure (Act V of 1908) and matters of Civil Practice. By *M. L. Agarwala* B. Sc., LL. B. (London). In Two Volumes. Price Rs. 12. Allahabad. Ram Narain Lal, Law Publisher. 1908.

Although the new Code was passed in the early part of the current year, the Legislature postponed its coming into effect till the beginning of the new year in order to give the public and the profession an opportunity of studying it. It is now premature to judge to what extent the members of the profession have availed of this opportunity. But the time has been very well utilised by commentators, and we have had occasion to notice several commentaries which have already been published, during the last four or five months. Some commentators have had the advantage of utilising the materials to be found in their commentaries on the old Code and readjusting them under appropriate provisions of the new Code. Mr. Agarwala apparently had no such advantage. But the fact that he has had to start with an apparently clean slate, has not prevented him from placing in our hands a really intelligent and at the same time a very concise commentary on the Code. The case notes are commendably brief. Both English and Indian decisions have been utilised specially in dealing with the rules and orders; but preference has, so far as possible, been given to Indian rulings. The value of a commentary on the new Code will be best tested by its use, but so far as we can judge at present Mr. Agarwala's book will bear this test. Whilst fully recognising the merits of the work, we cannot, however, overlook the fact that it bears marks at places of hasty execution. Altogether the book will prove useful and such shortcomings as there may be will, we presume, be removed in the next edition.

### Notes of Cases.

#### CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

**CRIMINAL REVISIONAL JURISDICTION.** Before HOLMWOOD and RYVES, JJ. **CRIMINAL REVISION MIS.** No. 144 of 1908. **ABBAS AND ORS.,** Petitioners *v.* **KING-EMPEROR** on the complaint of **TONORUDDI.** 26th November 1908.

*Criminal Procedure Code, sec. 526—Transfer—Prosecution witness being a relation of the trying Magistrate.*

This rule was issued for the transfer of a case pending before the Honorary Magistrate to the file of any other Magistrate competent to try it. The material allegation on which the transfer was asked was that the trying Magistrate's cousin was interested in the result of the case and he was a witness in the case against the Petitioners.

Their Lordships in making the rule absolute observed:—

"The District Magistrate has not shown any cause but he has forwarded to us a letter from the Sub-divisional Officer of Narangunj in which that officer expresses some doubt whether the alleged disqualification of the Honorary Magistrate which consists in his being the cousin of a witness in the case who admittedly has an interest in the result falls strictly within any of the grounds mentioned in sec. 526, Cr. P. C. It is sufficient for us to say that whether it falls strictly or otherwise within the letter of the law, it would appear expedient for the ends of justice that the case should be tried by another Magistrate. As it is a dispute between two influential zemindars, we think that it should be tried by the Sub-divisional Officer himself."

*Babu Dasarathi Sanyal with Babu Ramoni Mohan Chatterjee for the Petitioners.*

B. C.

*Rule made absolute.*

**CIVIL APPELLATE JURISDICTION.** Before MITRA and CARNDUFF, JJ. **CIVIL RULE** No. 3816 of 1908. **PHULCHAND SAHU,** Plaintiff, *v.* **KASHI SAHU,** Defendant No. 2, Opposite Party. 7th December 1908.

*Bill of exchange—Hundi—Liability of undisclosed principal.*

Plaintiff alleged that the Defendant No. 1's father and Defendant No. 2 had a partnership business and took a loan in respect of that business from him under two hundis which, however were executed by Defendant No. 1's father alone, he being the senior partner. The Defendant No. 1's father being dead he claimed a decree against Defendants Nos. 1 and 2 for the sum covered by the hundis.

Defendant No. 1 did not appear; and Defendant No. 2 denied all liability, alleging that he was a minor and that he never formed a member of any firm with Defendant No. 1 or his father.

The Small Cause Court Judge after taking Plaintiff's evidence refused to take other evidence on Plaintiff's behalf in proof of Defendant No. 2's partnership or of his majority and gave a decree against Defendant No. 1 alone and dismissed the suit against Defendant No. 2.

Plaintiff obtained a rule against Defendant No. 2 to show cause why the decree so far as it dismissed the suit against him should not be reversed.

It was argued on behalf of Defendant No. 2



that even assuming that the Defendant No. 2 was major and did form a member of the partnership with Defendant No. 1's father and the loan was taken for partnership business, still inasmuch as the hundis purported to have been signed by the Defendant No. 1's father alone in his personal capacity and not as representing the firm, the Plaintiff could not get any decree against the other members of the firm. That in this respect bills of exchange stood in a special class in which the general law of the liability of undisclosed principals in contracts was inapplicable.

*Held*—Accepting the contention, that the Defendant No. 2 was not liable.

*Babu Raghubath Singh* for the Petitioner.

*Babu Karunamoy Basu* for the Defendant No. 2, Opposite Party.

*Rule discharged.*

CIVIL APPELLATE JURISDICTION. Before CASPERSZ and COXE, JJ. APPEAL FROM APPELLATE DECREE No. 274 OF 1907. MOHENDRA NATH GHOSH AND OTHERS, Plaintiffs, Appellants v. JADU NATH MULLIK, Defendant, Respondent. 18th November 1908.

*Limitation Act (XV of 1877), Sch. II, Arts. 89, 120—Accounts, suit for—Termination of agency—Period from which time runs.*

The suit was for accounts. The Defendant acted as *gomasta* of the Plaintiff from 1292 to the end of 1309. The Defendant, it was alleged, rendered accounts up to 1298. He gave papers up to 1308. The Plaintiff's case was that the Defendant misappropriated the paddy and money collected by him, and did not give the papers of 1309, that is *thokas, shehas* and counterfoil receipts. Hence the suit was brought in 1905 for accounts from 1299 to 1309, for delivering the above-named papers, and for a decree for paddy and money to be found due upon taking accounts.

The defence was that the suit was barred by limitation; that the suit was barred under secs. 13 and 43, C. P. C.; that he did not collect rents in 1309; that the suit was not maintainable without Plaintiff's getting a succession certificate; that the Defendant gave all papers due by him to the Plaintiff, and rendered all accounts and remitted all collections made by him; that nothing was due by him.

The first Court partly decreed the suit. The Plaintiffs were declared entitled to get account from the Defendant from 1299 to 1309. A Commissioner was directed to be appointed to ascertain the collections and remittances of the Defendant; and the Defendant was ordered to deliver *thokas*, &c., of 1309.

On appeal by the Defendant, it was held that the suit was governed by Art. 89 of the Limita-

tion Act and he could not after a period of 3 years had elapsed from his father's death in 1308 B. S. maintain such a suit. The appeal was accordingly partly decreed.

The Plaintiffs appealed to the High Court.

*Held*—That Art. 89 and not Art. 120, Sch. II of the Limitation Act was applicable, and limitation began to run from the date of the Plaintiff's father's death. The particular agency terminated by that event.

*Shib Chunder Roy Chowdhury v. Chandra Narain Mukerji* (1 C. L. J. 232), followed.

*Babu Debendra Nath Ghose* for the Appellants.

*Babu Joy Gopal Ghosa* for the Respondents.

A. T. M.

*Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before STEPHEN and DOSS, JJ. APPEAL FROM APPELLATE DECREE No. 944 OF 1906. AMJAD ALI AND OTHERS, Plaintiffs, Appellants v. SRIMATI KADERJAN BIBI AND OTHERS, Plaintiffs, Respondents. Heard, 10th November 1908. Judgment, 20th November 1908.

*Regulation XI of 1825, sec. 4—Non-occupancy raiyat, at the time of accretion—Occupancy raiyat, at the time of suit—Accretion, interest in.*

The suit was brought by the Plaintiff for possession of a plot of land which he claimed as an accretion to his jote. The accretion was not denied; and it was found that at the time of the suit the Plaintiff was an occupancy tenant. At the time of the accretion, however, he was a non-occupancy tenant; and the question was whether Reg. XI of 1825, sec. 4 applies to the case.

*Held*—A non-occupancy tenant can acquire a right under sec. 4, Reg. XI of 1825.

S. A. No. 866 of 1893 (unreported) and S. A. No. 2520 of 1904 (unreported) followed.

*Zakuruddin Paikar v. Parkar*, 4 W. R. C. R. 57 and *Benu Parshad Koeri v. Chaturji*, I. L. R. 33 Cal. 444, distinguished.

*Babu Harendra Narayan Mitter* for the Appellants.

*Moulvi Sarajul Islam and Babu Hari Charan Sorkhel* for the Respondents.

A. T. M.

*Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before CASPERSZ and COXE, JJ. APPEAL FROM APPELLATE ORDER Nos. 228 and 238 OF 1907. KARMA URAON AND OTHERS, Appellants v. BARAIK DEBI DOYAL SINGH, Respondent. Heard 12th and 13th November. Judgment 20th November 1908.

*Chota Nagpur Tenancy Act, secs. 44A, 62—First suit struck off—Plaintiff's remedy.*

The Plaintiff sued to recover arrears of rent



for the Sambat years 1960, 1961 and 1962. The Plaintiff in March 1906 sued for the rents of 1959 to 1961 and alleged that some rent for 1962 had been deposited by the Defendants. Issues were framed, and the 18th May 1906 was fixed for hearing. On that day the Deputy Collector recorded the order: "Plaintiff absent, struck off. Sec. 62 Chota Nagpur Tenancy Act." The same day the Plaintiff applied for restoration, and asserted that he and the Defendants had been present at the time of hearing, but the Deputy Collector declined to accede to the application. The Plaintiff then, in June 1906, without waiting for the expiration of the period of six months mentioned in sec. 44A of the Chota Nagpur Tenancy Act, instituted the present suits.

The Deputy Collector held the suits to be barred by the provisions of the section, but on appeal the Judicial Commissioner held that the suits were not barred.

The Defendants appealed to the High Court and contended (1) that the second suits were barred by sec. 44A of the Act; (2) that the order of the 18th May 1906 under sec. 62 was an error and that it was in reality an order under the second clause of sec. 77; (3) that the Plaintiff should have pursued his other remedies under secs. 66, 67 of the Act and by way of review; (4) that, at any rate, the fresh suits for the arrears of 1962 were incompetent.

*Held per CASPERSZ, J.*—That as no issue was tried and determined by the Deputy Collector on the 18th May 1906, the orders striking off the suits were passed under the first clause of sec. 77 read with sec. 62. Hence the only remedy open to the Plaintiff was to proceed by way of fresh suits, and if those suits were maintainable, he could properly include in his claim all arrears of rent then accrued due.

Sec. 62 of the Chota Nagpur Tenancy Act is not controlled by sec. 44A. Sec. 44A refers to a period during which action may not be taken, and such a restrictive section is not covered by the general rule laid down by sec. 4 of the Limitation Act. Sec. 44A restricts the Court's jurisdiction rather than the Plaintiff's right of suit; the latter exists though it is in abeyance for six months.

Sec. 44A must be construed strictly and in favour of the Plaintiff, as it encroaches on his ordinary right to sue for arrears of rent.

It is only in the case of a fresh suit, which the Plaintiff is permitted by sec. 62 to bring, that the rent arrears claimed may be the same as in the suit struck off. The words 'struck off' mean that the suit has, and never had, any existence, they imply that the suit is withdrawn as in sec. 373, C. P. C.

*Karajlal v. Shomeswar* (I. L. R. 29 Bom. 219 at p. 225), referred to.

*Per COXE, J.* contra—Sec. 44A is not a provision

for the limitation of suits within the meaning of sec. 62. The word 'limitation' has acquired by custom a technical meaning. The Legislative authorities in framing sec. 62 intended only to refer to the latest date by which a suit might be instituted.

The second suit was not a new suit but a continuation of the first suit.

Sec. 44A can be construed against a landlord and in favour of the tenant.

*Babu Jogesh Chynder Dey* for the Appellants.

*Babu Nalini Ranjan Chatterjee* for the Respondent.

A. T. M.

*Appeal dismissed.*

### OATH OF ADMISSION.

(FOR MEMBERS OF THE AMERICAN BAR.)

The general principles which should ever contract the lawyer in the practice of his profession are clearly set forth in the following Oath of Admission to the Bar, formulated upon that in use in the State of Washington, and which conforms in its main outlines to the "duties" of lawyers as defined by statutory enactments in that and many other States of the Union—duties which they are sworn on admission to obey and for the wilful violation of which disbarment is provided; I do not solemnly swear:

I will support the Constitution of the United States and the Constitution of the State of . . . . .

I will maintain the respect due to Courts of Justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of defenseless or oppressed, or delay any man's cause for lucre or malice. So help me God.

We commend this form of oath for adoption by the proper authorities in all the States and Territories.—

*The Green Bag.*

# THE Calcutta Weekly Notes.

Vol. XIII.]

MONDAY, JANUARY 4, 1909.

[No. 8

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### REPORTS (See Index.)

WE ARE GLAD TO NOTE THAT MR. E. J. TREVELLYAN, who was a Puisne Judge of the Calcutta High Court and who is now a Fellow of the All Soul's College and the Reader in Indian Law at the University of Oxford, has been knighted. The retired Judge has kept up his studies of the Hindu Law and has produced some excellent works on the subject which we have noticed in these columns. We have great pleasure in congratulating the ex-judge for the honour conferred on him on the New Year's day. We regret, however, to notice that no New Year honours have been conferred on any of the existing or recently retired Judges of the Calcutta High Court.

THE BENGAL GOVERNMENT HAS, AS ORIGINALLY contemplated, extended certain portions of the New Chotanagpur Tenancy Act (VI, B. C. of 1908) to Perganahs Barahabhum and Patkum in the District of Manbhum. The notification, dated the 22nd December 1908, is reproduced in full in another column. Sec. 1, cl. (3) of the Act provides that the Local Government may, by notification, extend the whole or any portion of this Act to the District of Manbhum or to any part thereof. As in previous instances of the extension of certain provisions of the Bengal Tenancy Act to Chotanagpur, the Local Government has not merely made its selection of the sections to be extended to the new area, but has decided what portion of a particular section should be thus extended. The present notification shows that certain

words and phrases have been omitted from some of the sections. The operation of the sections may, however, be so modified by this process that serious doubts may arise whether such a mutilation of the sections and their application in that shape does, in all cases, satisfy the requirements of sec. 1, cl. (3) of the Act.

IT IS EASY TO CONCEIVE OF A SELECTION of sections, specially, when they have been thus altered, operating in a manner altogether different from that contemplated by the Legislature. We do not say that the present notification is open to this objection. But it is conceivable that such tinkering with the statutes in the course of their extension to certain areas by notification may amount to new legislation or at any rate amended legislation for such areas without the sanction or approval of the Legislature. Legislation by notification has been gaining in favour for some time past and this method of clipping the statutes is open to far more serious criticism than what has been advanced with regard to the ordinary mode of legislation by notification. In fact, it may be questioned before the Courts of law whether the piecemeal extension of an enactment leaving out particular sections or portions thereof would not in most instances be *ultra vires*.

THE CASE OF *Santishwar Mahanta v. Bakhikanta Mahanta*, a report of which appears at p. 177 of this issue, deserves some special notice. In this case it has been held that when an endorsement of a part payment of the principal of a debt is written by a person other than the debtor and the debtor puts his signature under the endorsement, the part payment thus made and endorsed does not save limitation under sec. 20 of the Limitation Act read with its proviso. Their Lordships' decision is based upon the Full Bench case of *Mukhi Heji Rahmutulla v. Govari Bhuja*, 23 Cal. 546. But the facts of that case were altogether different and the point which actually arose for decision in that case was whether the provisions of sec. 20 of the Limitation Act were satisfied when a part payment was made by an agent of the debtor and the fact of the part payment appeared in the handwriting of another person who was the agent of that agent. The

Full Bench held upon the construction of sec. 20 and its proviso, that the fact of part payment should appear in the handwriting of the person who made the payment. If an agent does both, the requirements of sec. 20 are satisfied but if one person as agent makes the payment and another person whether debtor or another agent endorses the payment, the provisions of sec. 20 will not be complied with.

BUT IN THE CASE UNDER NOTICE IT APPEARS TO have been assumed that the payment was made by the debtor, that the body of the endorsement was in the handwriting of another person who presumably wrote it under the authority of the debtor and the debtor put his signature under the endorsement. The question is whether under such circumstances it cannot be said that the "fact of the payment appeared in the handwriting of the person making the same." The section does not imply that every word of the endorsement should be in the handwriting of the person making the payment. In the Madras cases and the case in I. L. R. 26 Bom. 262 it was held that the affixing of the mark by the debtor who could not write his name, under the endorsement would be sufficient compliance with the provisions of the proviso to sec. 20 of the Limitation Act. Now if the mere affixing of the mark by an illiterate person below the endorsement does satisfy the requirements of the proviso why should not the signature of the debtor under the endorsement of payment be considered sufficient? As to the Madras cases and the Bombay case it is however said that as the debtor was illiterate his mark under the endorsement written by another person was sufficient to satisfy the requirements of sec. 20 so far as was possible.

BUT, IF A STRICT CONSTRUCTION IS TO BE PLACED on the words of the section, one may ask if it is at all possible for an illiterate person to make an endorsement of part payment in his own handwriting, for *ex hypothesi* he cannot write. The only ground on which the endorsement made by another person may be accepted as his is that by affixing his mark he makes the endorsement his own and it becomes thereby practically his own handwriting. But the same reasoning would equally apply in a case where an endorsement made by another person, is adopted by a debtor who can write by affixing his signature to it. It seems to us that the High Courts have placed a more strict interpretation upon the words of the proviso than its language would seem to justify. There is a case No. 99, Punjab Record, 1884, which is exactly in point, in which it was held that though an endorsement of payment of principal is not in the handwriting of the payer, still if it is signed

by him, the provisions of sec. 20 will be satisfied and this we think to be the reasonable view of the section.

WE PUBLISH IN THIS ISSUE A SHORT NOTE OF THE decision in the case of *Chetty v. Chetty*. We have already expressed our views with regard to this case. The following observations in the last number of the *Law Journal* from the point of view of the English law and the recent cases will prove instructive and interesting:—

The judgment of the President of the Probate, Divorce, and Admiralty Division in the Hindu marriage case, *Chetty v. Chetty*, establishes and confirms the rule that when a foreigner domiciled abroad comes to England and marries a person domiciled here in due form, the marriage is valid in this country. If the domicile of one of the parties is English, whether it be that of the husband or the wife, the Court will not regard the marriage as invalid merely because it was forbidden by the law of the domicile of the other party. That rule was stated by Lord Hannen, when the case of *Sottomayer v. De Barros* came before him for revision on the discovery of new facts, and it was followed in the recent case of *Ogden v. Ogden*. It was argued in the present case, in support of the nullity of the marriage between a Hindu temporarily resident in England and an English lady, that by the law of his caste the Hindu was restricted from marrying out of his religion, and that this personal incapacity to enter into the contract rendered the marriage void. A number of statutes affecting British India, starting from the Regulating Act of Warren Hastings of 1773, establish the bindingness in that country of Hindu family and religious law in all questions as to marriage and succession when one of the parties is a Hindu. The President has taken time to consider these statutes, but he has determined that they do not apply outside the country for which they were enacted. The disability which the husband pleaded was not in truth a disability imposed by his domicile, which attached to him wherever he went, but it was rather of the nature of a local religious disability from which, by conduct and by documents, he had shown an intention while in England to free himself. It is true that distinguished jurists, such as Westlake and Foote, have represented that it is indispensable for the validity of a marriage that the personal law of either party be satisfied so far as regards his capacity to contract it; but the doctrine, admirable as it is in its respect for foreign law, has not received the approval of the English Courts, which naturally tend to protect an English subject who has entered into marriage in due form with a domiciled foreigner. On the other hand, the English Courts have frequently refused to recognise marriages contracted abroad between an English subject and a foreigner when such marriages would not have been valid according to English law though they were allowed by the law of the place of celebration. To our mind, the state of the law upon the subject is not altogether satisfactory, and it is to be regretted that England did not take part in the Hague Conference on Private International Law, which discussed it some years ago. To regulate the international marriage is one of the most difficult problems confronting the jurist; but what a common interest was able to secure in the case of copyright ownership ought not to be impossible in the much more intimate relation of the family, with which all ideas of property are bound up.

## CURRENT INDIAN CASES.

TRAILOKYANATH v. JOGENDRA NATH, I. L. R. 35 Cal. 1017. C. P. C., sec. 211.

Meshe profits cannot be recovered for more than three years after the date of the decree or until delivery of possession *whichever* event first occurs.

MUKH LAL v. JAGDEO, I. L. R. 35 Cal. 1021. C. P. C., sec. 30.

A suit should not be dismissed for the failure of the Court to perform the duties imposed upon it by sec. 30, C. P. C., to issue notices and advertisements.

KADER v. JUGGESWAR, I. L. R. 35 Cal. 1023. C. P. C., sec. 108.

Sec. 108, C. P. C., does not apply to a decree passed by a Court after Plaintiff closed his case and Defendant having entered into his case subsequently withdrew, the decree having been passed on the merits of the case.

AUNAPONANI v. SUBRAMANIAN, I. L. R. 31 Mad. 347. C. P. C., sec. 283—Party.

The official assignee is not a necessary party to a suit under sec. 283, C. P. C., brought by decree-holder where during the pendency of the execution proceedings the judgment-debtor's property was vested in the official assignee.

RAM CHANDRA v. VIJOYARAGUVULU, I. L. R. 31 Mad. 349. Will—Construction—Legacy—Absolute estate.

Where a Hindu widow was given by a will a legacy for her maintenance and after several other legacies were given by the will to other persons there was a general clause to the effect that "they may enjoy them as they like with all ownership, rights, with power of alienation by gift, sale, exchange etc.

*Held*—That the general clause applied to all the bequests and the Hindu widow got an absolute interest.

ADIPURANAM v. GOPALASAMI, I. L. R. 31 Mad. 354. Mortgage—Redemption.

"As was pointed out by GEIDT, J., in *Bibijan v. Sachi Bewa* (31 Cal. 863), the decree for sale does not debar the mortgagor of any right in default of payment, the only penalty affixed to the default is the liability to have the property sold. In this view the mortgagor was entitled to pay the money, and the fact that his application took the form of an execution petition should not make any difference in the result."

D'SENA v. NAIR, I. L. R. 31 Mad. 364. *Negotiable Instruments Act, sec. 84 (2)*—Cheque, presentation of.

The question whether a cheque has been presented within a reasonable time is a question of fact—it has to be determined with regard to the nature of the instrument, the usage of trade and of bankers and the facts of the particular case under sec. 84 (2), Negotiable Instruments Act, 1881.

RANGAPPA v. KAMTI, I. L. R. 31 Mad. 366. *Alienation—Hindu widow.*

An alienation made by a Hindu widow with the *bona fide* consent of the nearest reversioner gives an absolute title to the transferee and binds the actual reversioner after the widow's death.

MASILAMANIA v. THIRUVENGADAM, I. L. R. 31 Mad. 385. C. P. C., sec. 13—*Res judicata*.

A suit brought by the Plaintiff to recover property as reversionary heir on an alleged relationship with the deceased having been dismissed, *held* that a second suit on allegation of another relationship is barred by the rule of *res judicata*.

PACHAIPERUMAL v. DASI THANGAM, I. L. R. 31 Mad. 400. *Indian Treasure Troves Act (VI of 1878)*—Ownership.

The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land and, in the absence of a better title, the right to possess it also.

A property which is not hidden does not come within the Indian Treasure Troves Act.

## Reviews.

THE CIVIL PROCEDURE CODE. Being Act V of 1908. With Notes, Commentaries and Reports of the Special and Select Committees, &c. &c. By Mahim Chandra Sarkar, of the Bengal Civil Service, Judicial Branch. Fourth Edition. Revised and brought up to date. Weekly Notes Printing Works. 1909. Price Rs. 12.

This is only the first part of the work. So far the author has been able to present us with annotations of only the sections-portion of the Act. The author explains that the progress of the work has been delayed by his endeavour to make the notes exhaustive and accurate. On looking into the notes, we find that he has fully justified his claim that his notes are at once comprehensive and accurate. The notes on the schedules will appear in the second part. But meanwhile the author has appended to this part a reprint of

the schedules in extenso, the corresponding provisions of the Old Code only being indicated by references given at the end of each section. Changes introduced in the new Code are clearly indicated under each section, and wherever possible in the language of the Reports of the Special and Select Committees on the Civil Procedure Bill. Further, wherever in the notes a reference to any section of the old Code occurs, the corresponding provision of the new Code is indicated within brackets. The classification of the notes and their arrangement under separate headings have been much more thorough in the present than in previous editions of his old Code. The only criticism we feel disposed to make regarding the notes is that here and there we find cases which might well have been left out. For instance some of the cases cited under the heading, "Right of co-sharer to deal with joint property" and "Adverse possession of one co-sharer as against another" at p. 65 have very little, if any, bearing on sec. 9. The Reports of the Special Committee and the Select Committee and two comparative tables of the provisions of the new Code and those of the old Code and other Acts repealed appear in this volume. The Table of Cases, and the subject index, are necessarily held over till the completion of the work. But judging from the evidence of thorough and conscientious work which the present volume affords, we look confidently forward to having a complete case-noted edition of the new Code on which the profession will be able to rely for purposes of reference.

THE CODE OF CIVIL PROCEDURE. Being Act V of 1908, with a Commentary. By *T. Krishnan Nair, B. A., B. L., High Court Vakil, Palghat* and *P. G. Rama Iyer, B. A., B. L., District Munsif, Vaidachalam, Madras.* Printed at the Ananda Press. 1908. Price Rs. 6

This is a handy annotated edition of the new Code moderately priced and well got up. The case law is worked up in the notes, so far as they go, with care and discrimination. But the references are evidently not exhaustive. We miss most of the decisions of recent years. The notes to Order No. 34 (relating to procedure in mortgage suits), Order No. 35 (interpleader suits) and the Second Schedule (dealing with arbitration) amongst others are inadequate. The differences between the provisions of the new and the old Codes are pointed out under each section and the reasons for the alterations indicated by quotations from the reports of the Committees. These reports are not separately printed in extenso in this edition. A comparative table of the provisions of the old and the new Civil Procedure Codes appear at the end of the work. There is a subject index but no table of cases.

## Notes of Cases.

### ENGLISH LAW COURTS.

**PROBATE, DIVORCE AND ADMIRALTY DIVISION.**—*Louie Venugopal Chetty (née Taylor)*, Petitioner *v.* *Venugopal Chetty*, Respondent. Before SIR GORELL BARNES, President. 7th December 1908.

*Marriage of twice-born Hindu with English woman—Validity—Suit for judicial separation—Desertion.*

The Petitioner alleged that she was married to the Respondent, now a District Judge in Madras, India, when the latter was studying for the Indian Civil Service in England, on the 1st September 1890; that as he was in debt it was arranged that she should stay in England till his debts were paid, that when his debts were paid he never sent for her, but he wrote to her to say he was going to marry a second wife and that when he came to England on furlough in 1904 he never visited her although when he met Petitioner's sister he promised to visit her but never did so, and that on her writing to him and asking him to make her a proper allowance he declined to do so and this suit was filed.

The Defendant denied desertion and also denied the validity of his marriage urging that by his personal law, the Hindu law, he could not lawfully marry a Christian woman even in England.

For the Respondent Mayne's Hindu Law was cited to show that Hindus belonging of the twice born classes cannot marry lawfully out of his own caste and that numerous Statutes from 1772 down to the present day recognised this personal law. The expert evidence of Sir Bhashyam Aiyangar, C. I. E., formerly acting Advocate-General and Puisne Judge of the High Court at Madras, and of Mr. Jardine, K. C., was in his favour and that Westlake in his Private International Law, sec. 21, placed the matter beyond any doubt and that his view was supported by a number of English cases, *Brook v. Brook*, 9 H. L. Cases, p. 193; *Mette v. Mette*, 1 Sw. & Tr., p. 416; *Sottomayor v. De Barros*, 3 P. D. 1. The passage in Westlake is this: "It is indispensable to the validity of a marriage that the personal law of each party be satisfied so far as regards his capacity to contract it whether absolute in respect of age or relative in respect of the prohibitive degrees of consanguinity or affinity."

For the Petitioner it was contended that the personal law could be waived and was waived. Bishop on Divorce was cited and *Sottomayor v. De Barros*, 5 P. D. 94; *Simonin v. Mallac*, 2 Sw. and Tr. 67 and *Ogden v. Ogden*, P. (1907) p. 107, were relied on. As to desertion the facts were not denied.

THE PRESIDENT held that desertion had been proved. He said that it was urged before him that

there was a number of marriages by Hindus in this country which they (the Hindus) considered illegal in their country. It was exceedingly difficult to believe that statement, and he could only hope that it was based upon misinformation, because it would be a very serious matter if such a thing were allowed to continue without notice being taken of it. He was absolutely satisfied in the present case that the Respondent himself did not take that attitude, and that he meant originally to be bound by the marriage. With regard to the question, *viz.*, whether the marriage was valid, the learned President observed that it was very obvious that the defence set up by the Respondent was not a very agreeable one to have to raise and fight. His Lordship had been unable to find as a fact that the law of India was in favour of the Respondent. After referring to various Indian laws, statutes, and regulation, his Lordship remarked that it was only in later years that Indians had been in the habit of voyaging to England, and the recognition of Hindu law and usages in India could not have been contemplated in relation to actions of Indians outside India. The Respondent relied upon certain religious disabilities, and the question was, was there any disability by such law of which Respondent could take advantage in England. The President went on to hold that he would decide this case in accordance with the view held by Lord Hannan in *Sottomayer v. De Barros* (5 P. D. 94). Ought a foreigner domiciled abroad who comes to this country and here marries in due form according to English law another person domiciled in England to be allowed to assert that he carries about with him while here the burden of an incapacity imposed by the laws of the foreign domicile to do that which he has done voluntarily and in due form according to the laws of England, to be allowed to assert and to repudiate his marriage on the ground that he is incapable of doing that which he has done and ought our Courts to be allowed to support such an assertion and repudiation with the consequent effects on the position of the wife and legitimacy of her child? To his mind the answer should be, No. *A fortiori* when as here the Respondent is a British subject. The Petitioner was entitled to a decree for judicial separation and the benefits thereof.

Messrs. Hume Williams, K. C., and Willock for the Petitioner, the wife.

Messrs. Barnard, K. C., De Gruyther, K. C., and Bayford for the Respondent.

J. H. W. A.

## CALCUTTA HIGH COURT.

### Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before CASPERSZ and COXE, JJ. • APPEAL FROM APPELLATE DECREE No. 2361 OF 1906. CHANDRA MONI SHAHA, Plaintiff, Appellant v. SRIMATI HALIJENNESSA BIBI AND OTHERS. Defendants, Respondents. 1st December 1908.

Civil Procedure Code (XIV of 1882), secs. 244, 316.—Sale, validity of—Defence, plea in—Question in execution.

One Abbas Ali owed the Plaintiff certain money. He died without discharging the debt and after his death the Plaintiff brought a suit against his heirs among whom was the Defendant No. 4, and obtained a decree against them. In execution of that decree he put up the disputed property to sale, and purchased it himself. He obtained the sale certificate and formal possession, but after obtaining formal possession he was again dispossessed. Thereupon he brought the present suit for recovery of possession.

The Defendant No. 4 pleaded that the land was her own and did not descend to her from Abbas Ali, and was not liable to be taken in execution for the debts of Abbas Ali.

The Munsif found that the land did belong to the 4th Defendant and did not descend to her from Abbas Ali. He found however that Defendant No. 4 never impeached the execution proceedings and did not suggest that she was not aware of those proceedings. He held therefore that she was not entitled to question the validity of the sale, or to dispute the Plaintiff's rights as acquired by that sale. The 4th Defendant then appealed to the Subordinate Judge and the Subordinate Judge considered that the Defendant No. 4 had not had a proper opportunity of meeting the Plaintiff's allegations of sale and purchase. He remanded the case to the Munsif in order that he should take evidence and ascertain whether the Defendant No. 4 was entitled to impeach the execution proceedings by reason of the fact that she was not aware of those proceedings. Subsequently the Munsif found that the Defendant No. 4 had been entirely unaware of the former proceedings and accordingly was not bound by the sale. That decision was upheld on appeal by the Subordinate Judge.

The Plaintiff appealed to the High Court and contended (1) that Defendant No. 4 was precluded by sec. 244, C. P. C., from contesting the validity of the sale, and (2) that the Defendant No. 4 was precluded from questioning the sale by the provisions of sec. 316, C. P. C.

Held—The Defendant in a suit is not debarred by sec. 244, C. P. C., from raising a point in defence

of his title even though he could have raised it but did not raise it in a former execution proceeding to which he was a party.

*Durga Charan Agradani v. Karamat Khan* (7 C. W. N. 607), approved.

If the Defendant is not put out of Court by sec. 244, C. P. C., he is not affected by sec. 316, C. P. C.

*Babu Sarat Chunder Bysak* for the Appellant.

*Moulvi Serajul Islam* for the Respondents.

A. T. M.

*Appeal dismissed.*

**CIVIL APPELLATE JURISDICTION.** Before SHARFUDDIN and COXE, JJ. APPEAL FROM APPELLATE DECREE NO. 1005 OF 1907. *SUKDEB SORMA AND ANOTHER*, Defendants Nos. 4 and 5, Appellants *v.* *ESUFALI AND OTHERS*, Plaintiffs, Respondents. 8th December 1908.

*Declaration, suit for—Limitation Act (XIV of 1877), Sch. II, Arts. 120, 144.*

The suit was for possession of certain lands on declaration of the Plaintiffs' title thereto. The Plaintiffs also sued for such other relief as in the opinion of the Court they might be entitled to. In their plaint the Plaintiffs asserted that they were dispossessed on the 14th December 1896 and assigned that date to their cause of action.

The suit was instituted on the 16th January 1905. The Munsif decreed the suit but on appeal the Subordinate Judge held that as the Civil Court, under the Assam Land and Revenue Regulation, 1885, had no power to override the settlement of the lands by the revenue authorities with the Defendants-Appellants, the Plaintiffs were not entitled to obtain possession of the lands. He therefore confined the relief giving them to the declaration of their title to obtain settlement.

The Defendants Nos. 4 and 5 appealed to the High Court and contended *inter alia* that if the suit was regarded as one for declaration of title it was barred by limitation.

*Held*—That a suit for declaration of title is not governed by Art. 144 of the Second Schedule of the Limitation Act but by Art. 120; and hence the suit was barred.

*Babus Tara Kishore Chowdhury and Braja Lal Chuckerbutty* for the Appellants.

*Babu Hemendra Nath Sen* for *Babu Kamini Kumar Chauda* for the Respondents.

A. T. M.

*Appeal allowed.*

*Suit dismissed.*

**CIVIL APPELLATE JURISDICTION.** Before SHARFUDDIN and COXE, JJ. APPEAL FROM APPELLATE DECREE NO. 227 OF 1906. *JAGAT CHANDRA DHAR*, Plaintiff, Appellant *v.* *THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS*, Defendants, Respondents. Heard, 1st and 2nd December 1908. Judgment, 2nd December 1908.

*Specific Relief Act (I of 1877), sec. 42—Declaration, negative, if consequential relief—Suit, dismissal of—Party not appealing—Civil Procedure Code (XIV of 1882), sec. 544.*

The suit was for declaration of the Plaintiff's title to a plot of land. The Plaintiff claimed the whole land in dispute as having been in their possession by direct cultivation, and occasionally as having been let out in portions to *karsa* tenants for the term of one year. The Defendants claimed the land as having first appertained to a Noabad taluk on *ijara* owned by them, which was afterwards assessed as a *mudafat jote raiyati*.

When the case came before the Munsif the parties gave evidence that the land was held by tenants of theirs, presumably tenants of the precarious character described, in the plaint. The Munsif held that the Plaintiffs were in possession, following the ordinary presumption that possession goes with the title and the suit was decreed. On appeal to the Subordinate Judge he came to a distinct finding that the Plaintiffs were not in possession of the land at all and held that the Plaintiff's suit was barred by sec. 42 of the Specific Relief Act, 1877. He, therefore, dismissed the suit.

The Plaintiffs appealed to the High Court and contended (1) that on the facts found, sec. 42 did not bar the suit; (2) that the suit should not have been dismissed entirely in respect of that plot but only as against Defendants Nos. 5 and 6 and not as against Defendant No. 1; (3) that as a matter of fact the Plaintiffs claimed consequential relief and therefore sec. 42 did not apply. The Plaintiffs prayed, *firstly*, for a declaration that the land in suit belonged to their taluk under a certain *taraf* and, *secondly*, for a declaration that it did not belong to a  *khas mehal* of the Defendant No. 1.

*Held*—That the prayer for the second declaration could not be regarded as a prayer for relief consequential on the first.

That the Plaintiff's suit was barred by sec. 42 of the Specific Relief Act.

*Nirmal Chunder Banerjee v. Mahamad Siddik* (I. L. R. 26 Cal. 14) distinguished.

The case of the Defendant No. 1 was that the plot was part of the Noabad jote of Asad Ali within the  *khas mehal* belonging to Defendant No. 1, but he did not take the specific ground that the suit was barred by sec. 42. The Defendants Nos. 5 and 6 also stated that the land was a



*mudafat* jote raiyati owned and held by Asad Ali under the *khas* proprietary right of Government, that is to say, Defendant No. 1. It was argued that as the Munsif decreed the suit both against Defendant No. 1 and Defendants Nos. 5 and 6, and as the Defendant No. 1 did not appeal, the Subordinate Judge was wrong in setting aside the decision of the Munsif and dismissing the suit as barred by sec. 42 as against Defendant No. 1, who had not taken that plea nor preferred any appeal.

*Held*—That sec. 42 applies if the Court arrives at findings, *firstly*, that the Plaintiff was not in possession of the land, *secondly*, that the Defendants were in possession of the land, and, *thirdly*, that the Plaintiff failed to seek recovery of land. Hence the Defendant No. 1, though he did not raise the specific plea that the suit was barred, yet did put forward contentions which were essential ingredients of such plea.

*Ram Kama! Saha v. Ahmad Ali* (I. L. R. 30 Cal. 429) referred to.

*Babu Dharendra Lal Kastgir* for the Appellant.

*Babus Ram Charan Mitra, Mahendra Nath Roy and Krishna Prosad Sarbadhikari* for the Respondents.

A. T. M.

*Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before SHARFUDDIN and COXIE, JJ. APPEAL FROM APPELLATE DECREE No. 46 OF 1906. KUNJA LAL NAG CHOWDHURY, Defendant No. 1, Appellant *v.* GUNABASHI DAS PODDER, (Plaintiff) and GURUDAS GUPTA AND ORS., *pro forma* Defendants Nos. 2 to 8, Respondents. Heard, 27th November. Judgment, 7th December 1908.

*Possession, suit for—Khamar land—Conversion into jote land by contract with purchaser—Partition—Jote lands, if transferable—Non-occupancy raiyat.*

This was a suit for recovery of possession of about one *dhone* of land with mesne profits. The disputed lands were alleged to be included within the Plaintiff's share of taluk, which he claimed to have purchased from the Defendants Nos. 2 and 3 and from their brothers Tarak Chunder Gupta and Udaya Chunder Gupta, who were predecessors in interest of the Defendants Nos. 4 to 8. The above purchase was said to have been made by a *kobala*, dated the 21st of Ashar 1308, B. S., (July 1893) for a consideration of Rs. 3,000.

The Gupta brothers, from whom the Plaintiff purchased the interest, were owners of a divided one anna and odd gundas of the present taluk. The share sold by the Gupta brothers to the Plaintiff was 7½ gundas. The Gupta brothers sold their remaining interest to different persons on various dates.

In the year 1305, B. S., a partition of the mehal

was effected among the various purchasers including the Plaintiff. In that partition the lands in suit along with other lands were allotted to the Plaintiff's share which after the partition formed a distinct plot.

The lands in dispute were the *khamar* lands of the Gupta brothers at the time when they were holding the estate as proprietors. The *kobala* mentioned above, by which the Plaintiff acquired the interest from the Gupta brothers, reserved the *khamar* lands of the vendors, as jote lands of Tarak Chunder Gupta, leaving to the Plaintiff only a right to receive rent from him in accordance with the rate prevailing in the Pergunnah.

After the death of Tarak Chunder Gupta, his executor, the Defendant No. 2, sold the *khamar* lands to the Defendant No. 1 in 1306. The Plaintiff alleged that Tarak Chunder Gupta had no saleable interest in the *khamar* lands, but that on the Plaintiff's attempting to take *khas* possession of the *khamar* lands that had fallen in his plot, he was resisted by Defendant No. 1 on the strength of his purchase from the executor of Tarak Chunder Gupta, and hence the present suit.

The Defendant No. 1 was the principal and contesting Defendant. The Guptas were the formal Defendants. The defence was that under the terms of the *kobala* the Plaintiff had no right to claim *khas* possession, and that he was only entitled to receive rent from Defendant No. 1 at the Pergunnah rate.

The Munsif gave the Plaintiff a decree; on which the Defendant No. 1 appealed to the Subordinate Judge, who confirmed the judgment and decree of the first Court.

The Defendant No. 1 appealed to the High Court and contended (1) that under the terms of *kobala* (Ex. 1) the Plaintiff was estopped from claiming *khas* possession of the lands in suit, and was bound to recognise the jote right of the Defendant, and was entitled only to claim rent according to the Pergunnah rate; (2) that the terms of Ex. 1 either created a permanent interest in favour of Tarak Chunder Gupta or that they amounted to a lease in his favour from year to year, and that Tarak's right to the lands in dispute was more than the right of a non-occupancy raiyat as defined by the Bengal Tenancy Act; (3) that the Appellant having purchased only a portion of the jote lands of Tarak Chunder Gupta, the Plaintiff was not entitled to a decree for *khas* possession.

*Held*—That under the terms of Ex. 1 the Plaintiff could not take *khas* possession of the *khamar* lands which fell in his plot under partition so long as Tarak Gupta remained in possession of it. That portion of the *khamar* lands that fell in the plot assigned to the Plaintiff should since the partition be treated as a separate tenancy.

The terms of Ex. 1 did not create any permanent right in favour of Tarak Chunder Gupta.



From the date of the execution of Ex. 1 the *khamar* lands were divested of all the incidents that the law attaches to such lands, they having become ordinary jote lands under the various vendors of the Gupta brothers.

If Tarak Gupta's tenancy be regarded as a lease from year to year, then even if the lands were still regarded as *khamar* and not subject to the operation of Chap. VI, Bengal Tenancy Act, still such a tenancy would not be transferable.

So long as Tarak was alive and was in possession of the holding the contract precluded the Plaintiff from ousting him, but as the contract neither amounted to a permanent lease nor created occupancy rights, the tenancy under it was neither heritable nor transferable and came to an end on Tarak's death or on the transfer of the holding. The Plaintiff therefore was entitled to take *khas* possession of the lands in dispute on the death of Tarak and still more so on the transfer of the holding to Defendant No. 1.

Whatever right Tarak had in the *khamar* lands, had since the partition been divided into as many tenancies as there were proprietors among whom the partition was effected. The portion of the *khamar* lands that was allotted to the Plaintiff by the partition formed a distinct and independent non-occupancy holding under the Plaintiff. The whole of that portion was transferred to the Defendant No. 1 and none of it remained with Tarak. Hence the Plaintiff was entitled to *khas* possession.

*Babus Tara Kishore Chowdhury, Harendra Narayan Mitra and Chandra Kant Ghosh* for the Appellant.

*Dr. Priya Nath Sen and Babu Girija Prossonno Roy Chowdhury* for the Respondents.

A. T. M.

*Appeal dismissed.*

### Notification.

No. 5335.—The 22nd December 1908.—In exercise of the power conferred by sec. 1 (3) of the Chota Nagpur Tenancy Act, 1908, the Lieutenant-Governor is pleased to extend the following portions of that Act to parganas Barahabhum and Patkum, in the district of Manbhum:—

Sec. 3, cls. (viii) to (xiv), (xvii) to (xx), (xxii) to (xxvi) and (xxviii).

Sec. 3, cl. (xxvii), except the words "but does not include a Mundari Khunt-kattidar tenancy."

Sec. 5, except cl. (b) and except the words "but does not include a Mundari Khunt-kattidar."

Sec. 6, except the words "but does not include a Mundari Khunt-kattidar," in sub-sec. (1), and except the words "or immediately under a Mundari Khunt-kattidar" in sub-sec. (2).

Sec. 7, sub-sec. (1).

Secs. 16 to 24.

Sec. 37, except the opening words and the words "Provided as follows."

Sec. 61, except the words "the Deputy Commissioner or" in sub-sec. (2) and the words "Deputy Commissioner or" in sub-sec. (3), and except sub-sec. (6).

Sec. 62, except so much of sub-cl. (i) of cl. (2) as refers to proviso (ii) to sec. 35.

Secs. 68 to 71.

Sec. 80.

Sec. 81, except the words "Mundari Khunt-kattidar" in cl. (b).

Secs. 82 to 93.

Sec. 94, except the following portions, namely:—

(1) in sub-sec. (1), the words "or any law in force before the commencement of this Act";

(2) in cl. (a) of sub-sec. (1), the words "when such publication was made after the commencement of this Act";

(3) cl. (b) of sub-sec. (1);

(4) in sub-sec. (1), the word "respectively" and the words and figures from "and no demand" to "or in sec. 32";

(5) the proviso to sub-sec. (1); and

(6) in sub-sec. (2), the words "and seven years" and the word and letter "and (b)."

Secs. 95, 97, 103 and 106.

Sec. 110, except the words and figures "but not so as to affect any decision from which an appeal has been preferred under sec. 109."

Sec. 111, except the words "under this Act or under any law in force before the commencement of this Act" and except the words and figures "secs. 107 to 109 shall not apply, and".

Secs. 112, 114, 116 and 118 to 134.

Sec. 264, except the following portions, namely:—

(1) cls. (i) to (iv);

(2) in cl. (v), the words and figures "sec. 46, sub-sec.

(4), sec. 50, sub-sec. (2), and the words and figures "or sec. 73, sub-sec. (3)."

(3) cl. (vi);

(4) in cl. (viii), the words and figures "or sec. 252"; and

(5) cls. x, xi and (xv) to (xix).

Secs. 266, 267 and 269.—*Calcutta Gazette of 30th December 1908. Part I, p. 2085.*

# THE Calcutta Weekly Notes.

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### REPORTS (See Index.)

THE CEREMONY ATTENDING THE OPENING OF THE New Wing of the Calcutta High Court by His Excellency the Viceroy on Saturday, the 9th of January last, was quite unique and unprecedented in the annals of the Calcutta High Court which go back to 150 years. No such ceremony was observed on the establishment of the High Court of Judicature at Fort William in Bengal by Royal Charter merging therein the jurisdictions of the Supreme Court, the Sudder Dewany and the Sudder Nizamat Adawlat, or on the transfer of the Chartered High Court to the imposing buildings, which in point of architectural distinction occupy the premier place amongst the public buildings in Calcutta. But the imposing ceremony of last Saturday has for its precedent the opening of the Madras High Court buildings on the 12th of July 1892 by Lord Wenlock, the then Governor of Madras, which again was founded on the ceremony attending the opening of the Royal Courts of Justice in England by Her Majesty the late Queen Victoria. An account of the former is embodied in the opening pages of Vol. XV of the Indian Law Reports, Madras Series, and of the latter in Vol. VIII of the English Law Reports, Appeal Cases. The address presented by the Hon'ble the Chief Justice and the Judges, to His Excellency the Viceroy, as the representative of His Majesty the King Emperor, was both dignified and appropriate and followed the noble sentiments and not unoften the equally felicitous expressions of the Judges of England on the memorable occasion of the opening of the Royal

Courts of Justice. The marked feature of the addresses on behalf of the Bar and the Vakils was their simplicity and appropriateness to the occasion. We regret however to note that even a "passing reference" to current political topics in the address of the Incorporated Law Society of Calcutta was quite out of "place and time." His Excellency the Viceroy's reply to the Judges' address was very happily conceived both in its style and substance. The references by His Excellency to the great historical and no less romantic reminiscences of the parent Courts, of which the present Court is but an offspring, will surely awaken in everyone connected with the High Court a sense of self-respect and legitimate pride.

REGARDING JUDICIAL INDEPENDENCE OF WHICH special mention is made in the address of the Hon'ble Judges of the Calcutta High Court, we may point out, that it is one of the chief judicial attributes which is recognised even by the Sovereign as being essential alike for the security of the Crown and the liberty of the subject. This is what Her Majesty the late Queen Victoria said in her address on the occasion of the opening of the Royal Courts of Justice in 1882 (*Vide L. R. 8 A. C.*, p. 2).

"I have all confidence that the independence and learning of the Judges, supported by the integrity and ability of the other members of the profession of the law, will prove in the future, as they have been in times past, a chief security for the rights of my Crown and the liberties of my people."

THE REPLY OF THE JUDGES OF ENGLAND TO Her Majesty was instinct with the consciousness of human shortcomings and fear of God. The noble sentiments that they gave expression to were worthy of the glorious traditions of the English Bench which have always been a matter of peculiar pride of the British people. Their Lordships referring to the traditions of Her Majesty's Judges said that they had always endeavoured to fulfil their great duties with "firmness, impartiality and integrity, in fear of God and without fear of man," and the noble Judges never uttered a greater truth than when they said that the lustre of the British throne consisted in its being "founded on law," "sustained by justice," and "established in the hearts of the people."

THE LORD CHANCELLOR SPEAKING ON BEHALF OF THE JUDGES concluded by saying :—

"Your Majesty's Judges are deeply sensible of their own many shortcomings, and of their need of that assistance which they have constantly received from the Bar of England, and from the other members of the legal profession; but, encouraged by your Majesty's gracious approval, and having before them the examples of a long line of illustrious predecessors, they have endeavoured, and will always endeavour, to fulfil the great duties entrusted to them with fidelity to your Majesty, with zeal for the public service, with firmness, impartiality, and integrity, in the fear of God, and without fear of man. That they, and their successors, may be enabled truly to do justice within these walls, as long as the British name shall endure; that the blessing of the Almighty may rest upon their labours; that the law which they administer may ever be a terror to evil-doers, and a strength and support to those who have right on their side; and that your Majesty may be preserved for many future years, still to shed fresh lustre upon a throne founded on law, sustained by justice, and established in the hearts of your Majesty's people, is the fervent prayer of all the Judges of your Majesty's Supreme Court of Judicature, for whom on this august occasion it has been my privilege to address your Majesty." (See L. R. 8 A. C., pp. 3 and 4.)

It will be noticed that the concluding portion of the address of the Hon'ble Judges of the Calcutta High Court, which is published below, also breathes the same sentiments.

#### OPENING OF THE NEW WING OF THE HIGH COURT BY HIS EXCELLENCY THE VICEROY.

Gentlemen holding tickets of admission to the ceremony arrived by the gate of the new building opening on Old Post Office Street. They assembled in the Civil Court of the new wing at 11-45 A.M. and were conducted to their seats by the Secretary to the Hon'ble the Chief Justice. Those entitled to wear uniform appeared in full dress. Members of the Bar (Advocates of the High Court) wore evening dress, white ties over band, and gown. The Vakils wore their usual robes.

His Honour the Lieutenant-Governor of Bengal arrived at the Judges' private entrance, where he was met by the Registrar, Appellate Side, and conducted to his seat in the new building.

Her Excellency the Countess of Minto arrived at the gate of the new building in Old Post Office Street where she was met by the Registrar, Original Side, and conducted to her seat in the new building.

The Chief Justice and Judges, who were in their scarlet sessions robe and wig, assembled in the Chief Justice's room at 11-45 A.M., and proceeded to the top of the staircase at the main entrance of the Court on the Esplanade. They were joined there by the Advocate-General, the Sheriff, the Government Solicitor, the Senior Government Pleader and the Registrars, Original and Appellate Sides. The Chief Justice met His Excellency the Viceroy at the entrance, conducted him up the staircase and presented the Judges, the Law Officers of the Crown and the above officials of the Court. A

procession was then formed with six Chobdars walking in files of two to lead the way in the following order:—

Registrar, Appellate Side.	Sheriff.
Senior Government Pleader.	Registrar, Original Side.
	Government Solicitor.
	Advocate-General.
	Oar.
Mace.	Sword of Justice.
Mr. Justice Richardson.	Mr. Justice Ryves.
Mr. Justice Doss.	Mr. Justice Carnduff.
Mr. Justice Coxe.	Mr. Justice Shurfuiddin.
Mr. Justice Fletcher.	Mr. Justice Chitty.
Mr. Justice Holmwood.	Mr. Justice Caspersz.
Mr. Justice Mukerjee.	Mr. Justice Stephen.
Mr. Justice Brett, C. S. I.	Mr. Justice Harington.
	The Chief Justice of Bengal.
	His Excellency the Viceroy.
	Staff of His Excellency.

The procession proceeded by the public corridor to the Civil Court in the new wing.

The Chief Justice conducted His Excellency the Viceroy to his seat on the Bench. On the entrance of His Excellency the assembled guests rose from their seats and remained standing till His Excellency and the Chief Justice and Judges seated themselves.

The Chief Justice then presented to His Excellency an address on behalf of the Judges, and requested His Excellency to declare the new wing open.

His Excellency replied to the address and declared the new wing open.

The Chief Justice presented to His Excellency addresses on behalf of the Bar, the Vakils, and the Incorporated Law Society.

His Excellency acknowledged these addresses.

Their Excellencies accompanied by the Chief Justice, the Lieutenant-Governor, the Judges and the Members of the Viceroy's Council then left the Court-room, the assembled guests standing at their Excellencies' departure.

Their Excellencies then proceeded by the north corridor and were shown the Judges' Library and the other Courts, and left the building by the main entrance. His Honor the Lieutenant-Governor of Bengal and other distinguished guests also left the building by the main entrance.

#### JUDGES' ADDRESS.

To His Excellency the Right Hon'ble  
GILBERT JOHN ELLIOT, EARL OF MINTO,  
P.C., G.M.S.I., G.M.I.E., G.C.M.G.,  
Viceroy and Governor-General of India.

May it Please Your Excellency,

We, the Chief Justice and Judges of His Majesty's High Court of Judicature at Fort William in Bengal, ask permission to offer to Your Excellency, as the representative of His Majesty the King-Emperor, an expression of our loyal devotion

to His Majesty's person and throne and of our very grateful thanks for the part which Your Excellency has been pleased to take in the proceedings of to-day.

This is the first occasion, so far as our records show—and they go back for a period of nearly 150 years—of a ceremony of a nature similar to the present. It is, therefore, a matter of deep congratulation to ourselves that Your Excellency has consented to open these new Courts, which will, we trust, prove of substantial public utility, and convenient to suitors and to those whose duty it is to assist in the administration of Justice.

The building comprises two Court-rooms, and, amongst others, rooms for the Sheriff, Jurymen, Witnesses, the Police and the Press, a Record-room with all the newest appliances, and offices for several of the staff on the Original Side of the Court. It will prove a great relief to the present over-crowded state of the old building of the High Court. We have to thank Your Excellency's Government, and also that of the Province of Bengal, for the readiness with which sanction has been accorded to the proposal for the improvements to the building.

We venture to think that in point of antiquity, of jurisdiction—Civil, Criminal, Admiralty and Ecclesiastical—and of the vast population subject to that jurisdiction, there is no Court in the British Empire, outside the confines of the British Isles, which can compare with this High Court, the descendant, as it were, of the old Supreme Court created in 1774, and of the Sudder Dewanny Adawlut and of the Sudder Nizamut Adawlut. It is almost superfluous to refer to the large increase of work both on the Original and on the Appellate Sides since 1862, when the High Court was established, and to the probable necessity of a permanent increase in the number of Judges.

Your Excellency, by your presence here to-day, has signally evinced your personal interest in the administration of Justice in India, Justice which has to be, and is administered in the name of His Majesty the King-Emperor. It is, we venture to think, only befitting that these Courts should be dedicated to their future use by the representative of that Sovereign whose noblest prerogatives are justice and mercy, and from whom all Judicial jurisdiction within the British Dominions is derived. The Judges of this Court to whom from time to time His Majesty entrusts the administration of justice, have honestly endeavoured in the past, as they will, we are confident, endeavour in the future, to fulfil the grave and most responsible duties so entrusted to them, with fidelity to the throne, with zeal for the public service, with firmness, with strict impartiality, and in a spirit of complete independence. Appreciating as we do the absolute faith which the people of this Great Dependency have in the administration of British

Justice, and fully alive to the responsibility of not destroying, or in any wise impairing, that unbounded confidence, we most earnestly hope that we, and our successors, may be enabled to do our duty within these walls; that the law which we administer may prove deterrent to the evil-doer and a strength and support to those who have the right on their side; and that the unblemished reputation of British Justice may always be preserved, not only in these Provinces, but throughout the length and breadth of India.

#### THE VICE-ROY'S REPLY.

Chief Justice,—As the representative of the King-Emperor, I thank you for the address you have presented to me on behalf of the Judges of His Majesty's High Court of Judicature at Fort William in Bengal, and I am grateful to you for the opportunity you have afforded me of being present at to-day's proceedings.

You tell me that no such ceremony as that which we are assembled to celebrate is mentioned in your records. I realize the significance of the occasion, and hope that the Courts you have asked me to open to-day will fully meet the growing necessities of the public, as well as the professional convenience of those whose careers are devoted to the administration of justice.

The Government of India has been well aware of the overcrowded condition of the High Court buildings, and together with the Provinces of Bengal has readily recognised the wisdom of your demand for increased accommodation. It is not a new demand, for your records extend over many years, and an everwidening jurisdiction over a dense population has repeatedly called for the enlargement of your Courts and the re-arrangement of legal machinery. It is curious to look back upon your ancestors—I do not refer to the ancestors of the Judges, but of the High Court—the old Sudder Courts and the Supreme Court from the union of which the High Court of to-day is descended to look back to the days when Sir Elijah Impey was Chief Justice and the old Supreme Court sat at a building in Dalhousie Square, I believe on the site now occupied by St. Andrew's Church, and of which we are told that "the physical surroundings were not favourable to a command of the judicial virtues which it was so desirable to have in hand." It is pleasant to think that the judicial virtues of to-day will have no such excuse in the midst of the architectural beauties of their commodious modern abode. But notwithstanding crowding and discomfort the early days of the Courts were full of historical interest, of romantic trials of which we have all read, and incidents enlivened at times by a perhaps somewhat belligerent attitude towards the Court of Directors. But those times

have passed by, and I hope that the presence of the Viceroy on this occasion will tend still further to weld together the high administration of justice with the general administration of the Government of India. It is upon British justice that the people of India rely, it is the administration of that justice which we are so imperatively called upon to safeguard, and we need no assurance that the Judges of this Court will do their duty with the same sense of responsibility and the same distinguished ability as their many brilliant predecessors. And may I venture to say that the pleasure I feel in taking part in this ceremony is much enhanced by the fact that I have received the address of the Hon'ble Judges of the High Court from the hands of an old friend, who has for many years presided over their deliberations with such marked devotion to duty.

Chief Justice, I have great pleasure in declaring these Courts open.

#### ADDRESS ON BEHALF OF THE BAR.

*May it Please Your Excellency,*

We, the members of the English Bar, enrolled as Advocates of the High Court of Calcutta, beg respectfully to be allowed to join in welcoming Your Excellency on this auspicious occasion, and in thinking Your Excellency for consenting to open this New Branch of the High Court building.

The grave inconveniences which have long been felt not only by the Bar and the Officials, but also by Jurymen, visitors and witnesses owing to the want of room on the Original Side of the High Court will now, it is hoped, be completely removed, and we heartily thank Your Excellency's Government for the relief which this new extension will undoubtedly afford in this direction. We earnestly trust, moreover, that following upon the most welcome addition which has now also been made to the Courts available for the administration of Justice, there may be granted in the near future that much-needed increase in the Judicial strength of the High Court which the ever-growing burden of legal business renders so urgently necessary.

In conclusion, we desire, My Lord, to be permitted to avail ourselves of this opportunity to assure Your Excellency, and through Your Excellency His Majesty the King-Emperor, of the depth and sincerity of those feelings of loyal devotion and attachment to the Crown which the members of our profession have at all times steadfastly cherished and maintained.

#### ON BEHALF OF THE VAKILS.

*May it Please Your Excellency,*

We, the Vakils of the High Court of Calcutta, beg respectfully to associate ourselves with the

Hon'ble the Chief Justice, the Judges and the Advocates of Court in humbly welcoming Your Excellency on the occasion of the opening of this new building which has been erected under Your Excellency's Administration.

We trust that this additional wing will afford considerable relief to the present overcrowded state of the old building and remove the inconveniences which have long been felt for want of the accommodation that has become necessary with the increase of judicial work, and we confidently hope that both these buildings—the old and the new—will for ages to come serve—as the old has hitherto done—as a temple in which Justice will be administered to all classes of His Majesty's subjects in such a manner as to preserve unimpaired the world-wide reputation of British Justice.

We also take this opportunity respectfully to convey to Your Excellency and, through Your Excellency, to His Gracious Majesty the King Emperor our assurance of the most unflinching loyalty and the most profound attachment to the Crown.

#### OF THE INCORPORATED LAW SOCIETY.

*May it Please Your Excellency,*

We, the President, Committee and Members of the Incorporated Law Society of Calcutta on this occasion of opening the newly completed wing of the Calcutta High Court, desire to approach Your Excellency for the purpose of dutifully expressing our loyalty and devotion towards His Most Gracious Majesty the King Emperor.

In so doing we may aptly invoke the golden principle that British Rule in India is broad-based and must be maintained on British Justice, and record the fact that Indian High Courts are the bulwarks thereof and the chief sources whence British Justice is dispensed fearlessly and impartially without respect to persons.

We venture to interpret Your Excellency's very presence amongst us as an official recognition of that principle and of that fact, so greatly cherished by all communities of the King Emperor's Indian subjects.

Although this is not the time nor is it the place to do more than make passing reference to recent legislative enactments for the suppression of anarchy and crime yet we seek Your Excellency's permission to state that the Laws recently enacted in that behalf are received with unqualified satisfaction by our Society, not the least part of our satisfaction being due to the constitution of the Tribunal (consisting as it does of three Judges of the High Court) that has been appointed for trials in case of need, which, we earnestly trust, may never arise.

With the assurance of our unswerving loyalty to the Throne and person of the King Emperor, we have the honour to subscribe ourselves.

## Reviews.

**THE CODE OF CIVIL PROCEDURE.** Being Act No. V of 1908 with a Commentary. By *J. O'Kinealy and R. F. Rampini, M.A., LL.D.* Revised and brought up to date by *Harry Stokes, Barrister-at-Law and Advocate, High Court, Bengal.* Vol. II. New Edition. Calcutta. S. K. Lahiri, 54, College Street. 1909.

We have already noticed the first volume of this work which appeared in August last (*Vide* 12 C. W. N. ccxlvii). In the present volume, the schedule portion has been annotated. The learned commentator has devoted the same amount of patient labour in collecting materials, and intelligence in methodically arranging them under appropriate headings, that characterised the annotation of the first part. As already stated in our review of the first instalment of this work, the classification and disposition of the case law in the present edition is more methodical and thorough than in previous editions of the Code. The references have been brought up to date by collecting the decisions reported during the preparation of the work in the Addenda at the end of the volume. The Charter Act and the Letters Patent of the High Courts appear in an appendix. The statute and the Letters Patent of the Calcutta High Court are annotated. We have no doubt that the work will maintain the place it has held in the past as a commentary on the Code of Civil Procedure.

**CIVIL PROCEDURE IN BRITISH INDIA.** A Commentary on Act V of 1908. By *John George Woodroffe, M. A., B. C. L. Barrister-at-Law, a Judge of the High Court of Judicature at Fort William in Bengal and Ameer Ali, Syed, M. A., C. I. E., Barrister-at-Law, late a Judge of the High Court of Judicature at Fort William in Bengal.* Calcutta & Simla. Thacker, Spink & Co. 1908.

We have in this book a commentary on the Law of Civil Procedure in India in the truest sense of the term. To prepare a fairly intelligent digest of the cases bearing on individual provisions of the Code is itself a task requiring immense labour. The accumulation of case law on the provisions of the old Code, which in the main have been reproduced in the new Code though under a different arrangement, has been enormous, and it is not an easy task even to arrange the decisions passed by the various High Courts on particular provisions in an intelligible order. The difficulties are enhanced manifold when the object sought is not only to classify and arrange the decisions but to reconcile their discrepancies and inconsistencies, wherever they occur, and to evolve out of them the common grounds of agreement and to base thereon general rules for the regulation of

the procedure at different stages of legal proceedings as to which the provisions of the Code are not sufficiently informing. The learned authors have focussed on the various provisions dealt with as much light as they could gather from the diffused decisions on the Code of Procedure that has been in force in this country, and we are not surprised to learn that it has taken five years' solid work to accomplish this. The value of such a treatise in the handling of the Code and in the development of case law on sound lines cannot be over-estimated.

Although we cannot notice the commentaries in detail yet we may say that we have closely examined the annotations on some of the more important sections, for instance, secs. 47, 92-93, 115 (corresponding to secs. 244, 539 and 622 of the Old Code) and we feel no hesitation in saying that the commentaries under these sections may well rank as contributions on the law enunciated in those sections. In the schedule portion also, the notes on the new rules of pleading introduced in Order No. 8 and on the orders dealing with the subjects of Injunctions and Receivers amongst others deserve special mention. The changes introduced in the New Code and the reasons for them and their effect are clearly explained with reference not merely to passages in the reports of the Special and the Select Committees but to the case law bearing on these provisions.

It is not easy to combine in the same treatise a commentary and a complete digest of cases. It is stated in the preface that decisions have been noted up to and inclusive of December 1907. The number of cases cited amounts in the authors' estimate to 9470. "Many more have been consulted than have been cited" and these have apparently been left out. We notice omission of recent decisions—but of none, so far as we have been able to test, of any importance or laying down any new principles. But, as we have already indicated, the book will be chiefly valued for the help and guidance it will afford through its commentaries. The authors have also advisedly refrained from annotating the chapters dealing with the procedure in mortgage suits and the procedure relating to arbitration, as the former is sufficiently dealt with in other well-known works on the law of mortgage and an amendment of the latter is in contemplation. The book will undoubtedly take a front rank amongst legal publications in this country.

**SYNOPSIS OF LEADING CASES.** (English and Indian). Calcutta and Bombay University Law Examinations, Preliminary and Final. By *B. K. Mitra, B. L., of the Subordinate Judicial Service.* Calcutta, Thacker, Spink & Co. 1908.

The work is intended for candidates for law exa-

minations which are being held or are about to be held under the new regulations in Calcutta and elsewhere. The Calcutta University has prescribed the study of a number of leading English and Indian cases for the B. L. Examination. The present work is a synopsis of these leading cases, amongst others. To those who know how to use such synopses of cases judiciously a work like the present may be of real assistance in mastering and memorising the principles of those decisions.

**Notes of Cases.**  
**ENGLISH LAW COURTS.**  
**PRIVY COUNCIL.**  
**[APPEAL FROM CEYLON.]**

LORD CHANCELLOR.  
 EARL OF HALSBURY.  
 LORD ATKINSON.  
 SIR ARTHUR WILSON.  
 1908.  
 19, November.

LOKU NONA and others,  
 Appellants,  
 v.  
 THE KING, Respondent.

*Privy Council—Appeal—Criminal case—Murder-trial—Misdirection—Accomplice's evidence.*

Appeal from a conviction for murder and sentence passed by Mr. Justice Wood Renton sitting as a Judge of the Supreme Court of Ceylon, dated 22nd November 1907, and from a judgment passed by three other Judges of the same Court sitting as a Court for hearing points reserved under sec. 353 (1) of the Ceylon Criminal Procedure Code, dated the 11th December 1907. Special leave to appeal had been granted by the Privy Council. (*Vide* Report at 12 C. W. N. cxl). The facts were these:—On the night of the 31st July, Carlina, a servant girl in the employ of the husband (one Mudalali) of the first Appellant, was murdered and her body thrown into the sea which was washed ashore. The Police Inspector took the matter up promptly, an inquest was held and several persons were charged before the Magistrate, amongst these being the three Appellants and Mudalali, husband of the first accused. The Magistrate, however, committed the three Appellants to the Sessions and discharged the said husband. The principal witness and, indeed, the only eyewitness of the murder was one Jane Nona, another servant girl in the employ of the accused, who gave evidence on three occasions, on the 14th, 22nd and 27th August, before the Magistrate. Her statement was that the first accused gave the murdered girl Carlina a blow and that then she, Jane, was sent to fetch a kitchen knife which she did and that the second accused, Punchi Nona, cut the throat of Carlina and the third accused, Kaitan, held Carlina while she Punchi Nona was cutting her throat. All this was alleged to have happened on

the night of the 31st July when the ladies, Loku Nona and Punchi Nona, had had a good dinner and had drunk some wine. Jane added that Carlina had spread reports affecting the moral character of Punchi Nona (Punchi Nona denied having even heard of such reports) which must have angered Punchi Nona and her sister, the first accused, and it was admitted that, 6 months before, Carlina had been beaten by the ladies. It appears that in her examination-in-chief on the 14th August Jane had not said a word about bringing the knife or Punchi Nona cutting Carlina's throat with it and she came out with this story on the 27th August. The medical evidence showed that Carlina died of concussion caused by shock and "the balance of the medical evidence" to use the words of Mr. Justice Wood Renton went to show that Punchi Nona was *virgo intacta* and the insinuations made by Carlina as to her moral character were false. The defence rested on a conspiracy alleged to have been made to wipe out the whole family from the place, and on a total denial of the charge of murder.

In the record besides the Magistrate's record was sent up one in which one of the witnesses charged a Police Inspector with having assaulted him and in that case Jane was a witness and her statement was not believed by the Magistrate. The object of sending up this record was to overthrow the testimony of Jane. In the Sessions Court Jane was examined and cross-examined and nearly at the end of the trial the foreman of the jury asked Jane about the knife. Her reply was "I did not know the knife was asked for to kill Carlina. If I thought the knife was to be used on Carlina I would not have gone," i.e., to fetch the knife.

*Sir R. Finlay, K. C., Messrs. Corbet and Percera* devoted their whole argument to three matters:—

1st, that Jane's evidence was worthless.

2nd, that she was an accomplice.

3rd, that there was misdirection on the part of the Judge.

On the 1st point a number of contradictions, and alterations in her statement was carefully brought forward as also the opinion of the Magistrate in Record No. 2 disbelieving her. On the 2nd point it was admitted that Jane had brought the kitchen knife. On the 3rd point, the Judge had not directed the jury carefully. He did not tell the jury that Jane was not to be believed unless she was corroborated in material matters and it was urged that the verdict was absurd and could not stand.

*Mr. Corbet* followed and chiefly commented on the judgment of the Full Court.

*Messrs. Avory, K. C., and O'Hagan* were both heard in support of the conviction. The former urged that there had been no miscarriage of justice no misdirection and that according to the Ceylon law a conviction was legal even on the testimony of an accomplice without corroboration, and



in this case there was ample corroboration, and he submitted that Jane was not an accomplice, only a month passing Carlina had admittedly been beaten by the accused to such an extent that Carlina intended to commit suicide. At all events, their Lordships would not interfere unless the case fell under the rule laid down in *re Dillet*, A. C. (12) 1887, p. 467, which this case most certainly did not. The jury took a most intelligent view of the case, and had added that no suspicion rested on the Police and had actually recommended the accused to mercy.

Mr. O'Hagan went through numerous instances of corroboration of Jane's testimony.

Their Lordships then desired counsel to return and then without much delay announced that the appeal would be dismissed as it did not come within the principle laid down in *Dillet's* case and they would advise His Majesty to dismiss the appeal.

J. H. W. A.

Appeal dismissed.

## CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

**CRIMINAL REVISIONAL JURISDICTION.** Before SHARFUDDIN and COXE, JJ. CRIMINAL REVISION NO. 731 OF 1908. SHIB SANKAR HAZRA AND OTHERS, 1st Party, Petitioners v. G. L. WEATHERAL AND OTHERS, 2nd Party, Opposite Party. 3rd December 1908.

*Criminal Procedure Code, sec. 145—Proceeding under—Postponement sine die—Previous solenamah confirmed by decrees not given effect to—Legality of.*

On a Police report the Magistrate drew up proceedings under sec. 145, Cr. P. C., on the 22nd November 1906. He further issued an order for attachment pending the disposal of the case under sec. 145. On the 22nd November 1907, the Magistrate recorded the following order in the order-sheet. "The settlement proceedings will shortly begin and a big case like this can best be decided then. The case is adjourned *sine die*."

On the 23rd December, about a month after the above order, there was a petition put in by the second party, in consequence of which the Magistrate personally went to the place and made a local inspection with the result that he thought it necessary to proceed with the case. It appears that disputes were going on between the parties since 1883 and there had been many cases between the parties, in one of which there was a *solenamah* effected between the parties in which it was settled that a certain line should be drawn from east to west, the lands lying to the north of which would belong to the second party and those to the

south, to the first party. The lands in dispute from the beginning have been sometimes under water and sometimes above water. The Magistrate declared the second party to be in possession and the first party obtained this rule on the grounds, *inter alia*, that the Magistrate acted without jurisdiction inasmuch as he took up the proceeding after having adjourned it *sine die* which he could not do under the law and that he did not give effect to the *solenamah* which had been confirmed by decrees of Civil Courts.

Their Lordships observed:—

"With regard to the first point as to whether the Magistrate had or had not jurisdiction to postpone the enquiries *sine die*, we have been referred to sec. 344, Cr. P. C., which relates to power to postpone or adjourn proceedings. (Their Lordships here quoted the section). The reasons assigned by the Magistrate with regard to his postponing the enquiry *sine die* have been stated by him in the order-sheet, and we consider that the Magistrate had jurisdiction to act in the manner he did, especially, when he expected that the settlement proceedings were soon to commence \* \* \* \* \* The third ground taken

was with regard to the *solenamah*. The *solenamah* was no doubt a document which was followed in suits in the Civil Courts and confirmed by the decrees of those Courts. What the *solenamah* had decided was not possession but the right to possession, because it is admitted that at the time that the *solenamah* was executed all the lands were not above water. What was decided was that any land coming out of water after the *solenamah* would be taken possession of by the parties in accordance with the terms of the *solenamah*. The *solenamah* did not decide possession of the parties."

Mr. B. Chakravarty (with Babu Upendra Lal Roy) for the Petitioners.

Mr. A. Chowdhury (with Babu Surendra Nath Guha) for the Opposite Party.

B. C.

Rule discharged.

**CIVIL APPELLATE JURISDICTION.** Before MOOKERJEE and CARNDUFF, JJ. APPEAL FROM ORDER NO. 326 OF 1907. SHEIKH FAKIR MAHOMED, Petitioner, Appellant, v. SHEIKH UZIR ALI AND OTHERS, Creditors, Respondents. 8th January 1909.

*Previous deposition—Proof—Admissibility in evidence—Want of objection.*

Appeal from an order of F. Roe, Esq., District Judge of Hughly, dated the 27th May 1907.

This appeal arose out of an application made by the applicant for being declared as an insolvent. Amongst other evidence the objector relied upon Ex. A, which was a previous deposition of the applicant Fakir Mahmud in another case. The



District Judge relied upon this Exhibit and rejected the application.

On appeal to the High Court it was contended that the previous deposition of Fakir Mahmud (marked Ex. A) was not legally proved. As to this deposition which was given in a previous rent suit, Fakir Mahmud stated that he did not remember whether he gave this evidence. It was therefore contended that there was no evidence to shew whether this Fakir Mahmud gave the previous deposition.

It was contended on behalf of the Respondent that at the time when the document was marked as an exhibit no objection was taken to it, and therefore no objection could now be taken; the case of *Shahzadi v. The Secretary of State*, 34 I. A. 194, was relied upon.

*Held*, that previous deposition was not proved according to law inasmuch as it was not shewn that Fakir Mahmud who gave the previous deposition was the same person as the present applicant and the case was accordingly remanded.

*Babu Manmatha Nath Mukherjee* for the Appellant.

*Babu Samatul Chandra Dutt* for the Respondents.

S. C. S.

Case remanded.

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and CARNDUFF, JJ. APPEAL FROM ORIGINAL ORDER No. 457 OF 1907. CHANDRA KUMAR MAJHI AND OTHERS, Petitioners, Appellants, v. SANDHYAMONI AND OTHERS, Opposite Party, Respondents. 8th January 1909.

*Civil Procedure Code (Act XIV of 1882), secs. 371, 582—Death of one of the Defendants—Withdrawal of the suit against the surviving Defendant—Subsequent application of the heirs of the deceased Defendant for prosecuting the case.*

Appeal from an order of Babu Asutosh Banerji,

Officiating Sub-Judge, Second Court, Barisal, dated the 27th July 1907.

Plaintiffs brought a suit against Bashiram Majhi, Banamali Majhi and Sidam Majhi and got a decree after contest. Banamali and Bashiram preferred an appeal to the District Judge. The appeal was dismissed on the 28th February 1905; Bashiram died in Joista 1312 (May-June 1905); Banamali alone preferred a second appeal. The High Court remanded the case for deciding it after determination of certain points. Upon remand the Plaintiffs made an application for withdrawal of the suit as against Banamali; the application was granted and the Court ordered that the decree of the first Court against the other Defendants would stand good.

The Petitioners, sons and heirs of Bashiram Majhi, made an application under sec. 371, C. P. C., for revival of the appeal on the grounds, 1st, that the Petitioners were all minors at the time of the death of Bashiram Majhi and the Petitioner No. 1 had now attained majority, and, 2nd, that as the Petitioners were jointly interested with Banamali in the case, there was no necessity for their appearance in the appeal before, but as the Plaintiffs withdrew their suit against Banamali, the Petitioners had been prejudiced.

The Subordinate Judge dismissed their application on the ground that they were not minors and that the fact that they were jointly interested with Banamali Majhi in the case, was not a sufficient cause for not appearing earlier.

*Babu Bepin Chandra Mullik* for the Appellant contended that as the applicants were jointly interested in the case with Banamali there was no necessity for them to appear as long as the case was not withdrawn against Banamali, who was challenging the entire decree.

No one appeared for the Respondents.

*Held*, that the Petitioners should be allowed to apply for restoring the appeal.

S. C. S.

Case remanded.

# THE Calcutta Weekly Notes.

Vol. XIII.]

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[No. 10]

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### REPORTS (See Index.)

A COPY OF THE *Graphic* OF THE 12TH DECEMBER 1908 has been sent to us bearing a note that we might notice anything of interest to us. On turning over its pages, our attention was drawn by an attractive picture of the Calcutta High Court buildings to the following remarks:—

The High Court prides itself on its popularity with the native Press and the sedition-mongers, and a Hindoo Judge sits on the Bench. The result is that the trials of offenders on serious charges of murder or conspiracy against the Government more often than not are a pure farce, and the accused are acquitted on some technical point to which the complexity of the Code—as interpreted by the Court—lends itself. The necessity of a summary tribunal for dealing with such cases is most urgent.

We also find in the body of an article, which is announced in bold headline types to be a contribution from “a Civilian in Bengal,” some very objectionable remarks regarding the High Court under the heading “Where justice is blind.”

IT IS SUPERFLUOUS TO SAY THAT WE HAVE NOT come across a grosser libel on this Hon'ble Court of Record within recent years. We shall content ourselves for the present by pointing out for the information of the Bengal Civilian and the editor, printers and publishers of this apparently not well-informed journal that the High Court of Calcutta possesses the same powers with regard to contempt calculated to “scandalize the Court” as any other Court of Record. This power was exercised by

Lord Chief Justice Russel in the case, commonly known as the *Birmingham Daily Argus case*, *Reg. v. Gray* [1900] (2 Q. B. 39 : s. c. 4 C. W. N. cxlvi). It was only recently that this power was exercised by the Bombay High Court, in the case of *N. C. Kelkar*, 10 Bom. L. R. 1040.

WE ARE GLAD TO NOTICE THAT THE DECISION of Sir Francis Maclean, C. J., and Mr. Justice Harington in the Defendant's appeal in *Brojendra Kisor Rai Chaudhuri v. Clarke* has been received by the public press with unqualified approval. We are at one with them in regarding their Lordships' view upholding that of the first Court as both correct in law and fair and equitable. It is said by a small minority who are always for upholding arbitrary acts of Magistrates even when committed in clear violation of statutory provisions that such decisions are likely to affect the prestige of Magistrates and calculated to embarrass them in times of emergency. In short, people holding such views are desirous of placing Magistrates above law. The absurdity of such a demand is too evident to require serious criticism. The Code of Criminal Procedure and the Arms Act in this country contain provisions conferring on the Magistrates in some respects as drastic powers as are only to be met with in the ephemeral Irish Crimes Act. In view of such wide powers conferred on the Magistrates in this country, the statutes have in some places sought to require the exercise of such powers in a reasonable manner. If those safeguards are to be ignored by the Magistrate and the Courts are to connive at such disregard of the law, the result would be to take away the sanctity of homes. It would amount to giving a licence to the executive officers, in the words of the learned Chief Justice, “to forcibly enter another man's house and ransack its contents without any warrant in law.”

HIS LORDSHIP THE CHIEF JUSTICE, THEREFORE, very properly held “that it is of the highest importance in the interests of the public, that when Executive officers are invested with statutory powers of a special and drastic nature, they ought to be very cautious, before exercising these powers in satisfying themselves that they have strictly

complied with the provisions of the Act which created them." Mr. Justice Harington, although he was prepared to give the Defendant the benefit of the provisions of the Code of Criminal Procedure, or, in fact, of any other statute if his action could be covered thereby, held in effect that the Appellant's conduct had no justification in law. His Lordship also very properly observed that when a person did anything which was manifestly wrong to an individual, the doer can only justify his acts by only a strict compliance with a statute on which he chooses to rely. It is no less assuring to find even the dissentient Judge observing in the course of his judgment that "it is most necessary to prevent public officers from exercising their powers in a harsh, careless or arbitrary manner," but we are afraid that if His Lordship's interpretation of the law were to prevail, it would have the very opposite effect.

IT IS SAID THAT THE GOVERNMENT OF BENGAL IS prepared to undertake legislation for the discouragement of cigarette-smoking amongst juveniles provided some public associations make representations in the matter. We are sure that if the evil effects of cigarette-smoking in juveniles were generally known, public bodies would take up this matter in right earnest. It is, perhaps, not very ordinarily known that besides nicotine a very large quantity of the poison, carbon monoxide gas, forms an ordinary ingredient of the tobacco smoke especially from cigarettes. It is a matter of common knowledge that this gas impoverishes the blood by oxidation. Young persons, when they take to smoking, soon acquire the habit of inhaling the smoke which always results in the rapid absorption of this noxious gas as also of nicotinic into the system. The effect of the absorption of either of these poisons is to arrest the normal developments of the body and the mind and give rise to the distressing symptoms of dizziness, stupor, trembling of the limbs or hands, palpitation on slight effort, feeble pulse, irregular circulation and nervous prostration. Dr. Forbes Winslow, the brain specialist, says, the smoking of cigarettes, especially, in empty stomach, is a very potent factor in the making of a lunatic.

IT MAY BE USEFUL HERE TO CITE SOME AUTHORITY opinion of those who have specially watched the evil effects of cigarette-smoking amongst juveniles in America where the subject has been specially studied. Dr. C. H. Clinton of San Francisco Board of Education says:—

"A good deal has been said about the evil of cigarette-smoking, but half the truth has never been told. I have watched this thing for a long time, and I calmly and deliberately say that I believe cigarette-smoking is as bad a habit as opium-smoking. I am talking now of boys. A cigarette fiend will lie and steal just as a morphine or opium fiend will lie and steal. Cigarette-smoking blunts the whole moral

nature. It has an appalling effect upon the system and stupefies the nerves. I have seen bright boys turned into dunces, and straightforward honest boys made into miserable cowards by cigarette-smoking. I am not exaggerating. I am speaking the truth—truth that every physician and nearly every teacher knows."

Judge Stubbs of the Juvenile Court, Indianapolis, says:—

"There is something in the poison of the cigarette that gets into the boy's system and destroys all his moral fibre. When I commenced my second term as police Judge, there was such a great increase in the number of boy criminals that were brought before me, that I really became alarmed at the outlook, and commenced investigations as to what was the real cause. The result, I found, was that cigarette-smoking was at the bottom of it all, and it is an evil that the people of this State have got to fight, for it is growing fast and doing really more harm than the liquor that is being sold to men."

The Hon. George Torrance, Superintendent of the Illinois State Reformatory, says:—

"The cigarette is doing more harm than the saloon. Out of 1,500 boys under my care, 92 per cent. of them were cigarette-smokers when convicted, and 85 per cent. so addicted to their use as to be classed as 'cigarette fiends.'"

REFERENCE TO VOL. VII, P. 117 AND VOL. VIII, p. 210 of this journal will show the nature of the legislative measures adopted in several States in America and the British Colonies for checking the evils of juvenile smoking. Such legislation ordinarily imposes a penalty on the person selling cigarette or tobacco to persons below a prescribed age limit or persons procuring cigarette or tobacco for such persons. In Japan and some of the States above mentioned the law authorises the confiscation of cigarettes, tobacco, pipe &c., found in the person of juveniles in the streets or public places. Should any legislation be introduced in this country we should not advise the Legislature to go beyond this. Some States also provide for the punishment of youths found smoking, but in Japan the imposition of penalty on parents and guardians for permitting their children to smoke is considered sufficient. We are, however, not prepared to go so far in this country for it might lead to police harassment of parents and children. Further, should any such legislation be initiated we would limit its operation, to start with, to Presidency towns and to cigarette-smoking in particular. The Local Government may reserve power therein to extend the operation of the Act to other areas and to the smoking of tobacco in other forms when necessary. In the United States the age limit of the prohibition is ordinarily 21 years, in Japan 20, and in the British Colonies it ordinarily varies between 15 years to 18 years. In this country the age limit may be put down at 16. This new form of vice is not yet very widely spread amongst the youths in this country. Indian youths are not permitted to smoke in the presence of parents and other persons of the family to whom they owe respect. They

acquire the habit of smoking out of doors. Legislation, therefore, prohibiting cigarette vendors to sell this noxious drug to youths below sixteen will, we expect, very effectually check the growth of this evil.

### THE GRANT OF FRESH SANCTION TO PROSECUTE.

The law on the subject of sanctions is comprised in secs. 195 and 476 or more properly speaking in Chaps. XV and XXXV of the Code of Criminal Procedure. Sec. 195 of the Code of Criminal Procedure means in plain language that when one or the other of the offences mentioned in the section is committed in or in relation to any proceeding in any Court or when any of the offences mentioned in cl. (c) of the section is committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, then the sanction of that Court must be obtained and that if obtained it shall remain in force for 6 months from the date of the grant unless it is extended for good cause by the High Court. The object of the section unmistakably is to safe-guard persons from frivolous accusations of the offences mentioned in the section and to prevent the possibility of a private party keeping *in terrorem* over the head of the accused the intended prosecution for an indefinite time or even for an unduly long time. The Calcutta High Court observed in the case of *Dusbari Mundin v. Jagoo Lal* (22 Cal. 576), that the reason of the rule regarding the expiry of sanction after 6 months is that a "private prosecutor shall not be at liberty to procure sanction to prosecute from the Court and then keep the sanction pending *in terrorem* over the head of the accused indefinitely." It may be observed that this is the policy of the law only when the Court delegates the duty of prosecution to a private person. No limitation, however, is prescribed in the case of a Court taking action *suo motu* under sec. 476 and sending the case for inquiry to the nearest Magistrate of the first class. By sending the accused in custody to the said officer it acts the part of a prosecutor.

It must be noted, however, that even in the case of a Court taking action *suo motu* under sec. 476 of the Criminal Procedure Code the policy is not very different though no limitation is fixed by law. For, it may be observed that an appreciable delay in taking action by a Court is held to vitiate the proceedings. Even in these cases the authorities are to the effect that such proceedings ought not to be taken after the expiry of the proceedings in which or in relation to which the offence is alleged to be committed but that they must be taken so early as to appear as a part of the said proceedings. In a Full Bench case of the Madras High Court, *Rahmatulla v. King* (Madras, page 140) Sir Arnold White, Chief Justice, held that

contemplates the making of the order as a part of the proceeding in which the offence was alleged to have been committed or was brought under the notice of the Court. "The conclusion at which I have arrived is that it was the intention of the legislature that an order under the section should be made either at the close of the proceeding or so shortly thereafter that it may be reasonably said that the order is part of the proceeding." It is therefore clear that the general policy of the law is to the effect that the Court before which the offence is committed should be then and there apprised of the commission of the offence. The Courts should be moved immediately after the offence is committed. The Calcutta High Court goes even so far as to assert that no such steps should be taken after the close of the proceedings. For, observes Mr. Justice Gidder, "I do not think that it was ever intended that when the proceedings had terminated and passed beyond the ken of the Court, the attention of the Court should be subsequently re-drawn by some private person to the fact that in these proceedings there had been committed some offence in contempt of the Court's authority or against public justice which deserved punishment. The commission of the offence and the desirability of a prosecution should be so patent as to move the Court at the time to take action without the stimulus of an application by some interested person." (*Begu Singh v. Emperor*) 11 C. W. N. 568: S. C. 34 Cal. 551. It is therefore only proper that such proceedings should be availed of as soon as possible after the commission of the offence.

The 6 months' rule prescribed in sec. 195 is also a clear indication of the said intention of the Legislature. It is not legal for anybody to evade the effect of this rule of limitation by any indirect means. The granting of a fresh sanction nullifies the effect of the rule, for a private prosecutor is thereby enabled to do the very thing that the law prevents him from doing. The fresh sanction granted cannot be regarded a mere renewal or revival of the original; for call it we may by whatever name we please, its effect is just the same. It serves to nullify the salutary provision that no sanction can have effect for more than 6 months. The amended Criminal Procedure Code (V. of 1898) adds that for good cause shown the High Court can extend the time limited by the section. This prerogative therefore is vested only in the High Court for, the extension of time involves in it a grave principle affecting public interest and public policy. It was therefore held that proceedings for prosecution instituted 3 days after the expiry of the time limited by law were invalid, even though it was pointed out that those days were continuous holidays and steps were taken immediately after the holidays for prosecution (22 Cal. 576). (*Raj Chunder Moosumdar v. Gour Chunder*)

*Mozumdar*). So in another case the Calcutta High Court, though it did not decide the question if a Court has authority to grant fresh sanction, held that the Court did not exercise proper discretion in granting such sanction, as no explanation was given why proceedings were not commenced earlier (11 Cal. 529, *Joydeo v. Haritt*).

The Allahabad High Court may seem to take a different view as regards fresh sanction. The earliest case on the point before the amendment of the Code in 1898 is I. L. R. 6 All. 45. In that case a complaint was lodged on the strength of sanction obtained before the expiry of 6 months limited by law. But the proceedings were not finished within that time though they were pending owing to non-appearance of a party. In that case Straight, Officiating Chief Justice, expressed an opinion that a fresh sanction could be given but that was merely an *obiter dictum* as the point did not arise in that case; for, the original sanction did not lapse and was in operation and the Judge clearly stated that a second sanction was not at all necessary. It seems that he was so much impressed by the peculiarities of the facts disclosed in that case that he went the length of expressing the opinion referred to, which however had no bearing upon the case.

The discretion of a Court acting *suo motu* is, as already stated, hedged in by a clear limit of time. Much less therefore could a private party prolong the time within which he must institute proceedings either by allowing the 6 months to expire or by seeking to extend the time-limit by applying for a new sanction or revival or renewal of the previous sanction.

#### PARLIAMENTS IN THE EAST.

The British Government and the British House of Commons have welcomed with more than a conventional expression of good-will the meeting of the first assembly of the Commons and Lords of the Ottoman Empire at Constantinople. The Turkish Constitution provides for a Ministry responsible to Parliament, though not necessarily elected from its members; a House of Commons, with members elected by ballot for four years; a House of Lords, whose members are nominated for life; and an independent judiciary, who also hold office for life and are to try cases between officials and private persons upon the same principles as cases between any two individuals. Another part of the Constitution provides for those rights of individual liberty, freedom of education, of the Press, and of meeting, and inviolability of the home, which have been the proud privileges of Englishmen for centuries. It remains, of course, to be seen how these new conditions will stand the test of practice. But one thing recent history has made clear—that the desire for individual liberty and a free political life which political philosophers had often declared to be the peculiar privilege of the Aryan race is a fact common to all civilised peoples. Throughout the Orient we see the demand for such things growing in intensity and volume, and the demand is being answered. Turkey has obtained the full grant of constitutional government, India seems likely to have soon her local Parliaments and a larger measure of democratic representation upon the Legislative Council, and the same movement is making headway in Egypt. Notable, too, that lawyers are taking prominent part

in new development in Eastern life. The largest class among the members of the Parliament which is now meeting at Constantinople consists of advocates and ex-judges, and in India native barristers and Judges have been among the foremost of the workers for more self-government. As the lawyers have helped to build up the great democracy of the West, so it seems that the lawyers may gradually lay the foundations of democratic government in the East. The example of England and the public spirit of lawyers—these are two great factors making for the growth of Parliamentary government all the world over.—*The English Law Journal*.

#### CURRENT INDIAN CASES.

APPAYYA v. RANGAYYA, (F. B.) I. L. R. 31 Mad. 419. *Mortgage—Marshalling*.

A *bona fide* purchaser for value of a portion of a mortgaged property is not entitled to have the mortgaged property marshalled and to insist that the portion not purchased by him should be first sold before recourse is had to the portion purchased by him. But sec. 89 of the Transfer of Property Act gives the Court discretion to direct sale of a portion of the property before any other portion.

VENKATA RAMANA v. GOMPERTS, I. L. R. 31 Mad. 425. *Transfer of Property Act, sec. 85*.

In a suit by a subsequent mortgagee in which the prior mortgagee was a party the Court observed as follows:—

"All interested parties being before the Court, it is the duty of the Court, if it can do so, to make a decree which shall deal finally with the question between them and shall preclude the necessity of further litigation for the enforcement of any right arising out of the mortgage or mortgages in question in the suit. This is the obvious intent of sec. 85 of the Transfer of Property Act and it is clearly a desirable and proper intent."

DAMARAJU v. THADINADA, I. L. R. 31 Mad. 431. *Limitation Act, Sch. II, Arts. 29, 49*.

In a suit for refund of sale-proceeds of certain paddy wrongfully attached before judgment and sold and with regard to which Plaintiff's title was declared in a suit instituted by him under sec. 283, C. P. C.

Held—That limitation ran from the date of wrongful seizure and Art. 29 or 49 of Sch. II of the Limitation Act applied.

CHAMA v. PADALA, I. L. R. 31 Mad. 439. *Subrogation—Mortgage*.

Subrogation is allowed as a matter of right for the benefit of a purchaser at a sale subsequently set aside, who has extinguished an encumbrance on the estate upon purchase.

SUBRAMANIAN v. VEERABADRAN, I. L. R. 31 Mad. 443. *C. P. C., sec. 559*.

Sec. 559, C. P. C., appears to have been inserted to protect parties to the suit, who had not been made Respondents in the appeal, from being prejudiced by modifications made behind their backs in the decree under appeal.

CHALLA v. PALURY, I. L. R. 31 Mad. 446. *Hindu widow, alienation by.*

Where a Hindu widow conveyed her estate in favour of the next reversioner, *held* that the validity of the transaction is not affected by the fact that the reversioner was to retain a portion for himself and convey a portion to a third party.

SRINIVASA v. RANGASAMI, I. L. R. 31 Mad. 452. *Limitation Act, Sch. II, Art. 116.*

Art. 116 of Sch. II of the Limitation Act applies to a suit for damages on the ground of want of title to portion of land received by exchange as it is a suit upon breach of a contract in writing registered.

VALIA v. MARUTHA, I. L. R. 31 Mad. 454. C. P. C., sec. 108.

Under sec. 108, C. P. C., any part of the decree not affecting the Defendant applying cannot be set aside.

IN RE SHAH STEAM NAVIGATION COMPANY, I. L. R. 32 Bom. 421. *Indian Companies Act (VI of 1882)—Winding up.*

In an application to wind up a company under the Indian Companies Act Davar, J., after reviewing the authorities said:—If the Court comes to the conclusion that the main original object for which the company was formed has substantially failed or that the substratum of the company is gone it will consider that it would be just and equitable to wind up the company and will make an order for its compulsory winding up.

BALVANT v. SECRETARY OF STATE, I. L. R. 32 Bom. 432. *Remand—Subsequent hearing by a Bench which did not remand.*

When a case was remanded by the High Court and after the finding of the lower Court arrived the case was heard by a different Bench of the High Court, *held* that the previous judgment of the High Court was binding *quod* all points which were therein specifically decided beyond possibility of revision, but it would be otherwise in regard to any part of the judgment which could be shown to be grounded on such mistake or error as it would have been the duty of that Bench to correct, if it had been brought to notice when the judgment was delivered.

That in so far as any part of the judgment was based upon an assumption it was competent to the new Bench to disregard it.

## Reviews.

THE CODE OF CIVIL PROCEDURE, Act V 1908. With references to the provisions of the Old Code and cross-references to those of the New Code. By S. C. Roy, B. A., L. L. B. (Cantab), *Bar-at-Law*. The Weekly Notes Printing Works, 3 Hastings Street. 1909. Price Rs. 2.

The special features of this book are accurately summarised in the preface. As in some other reprints of the Act the corresponding provisions of the old Code are indicated on the margin of each section and there is also the usual reference table. There are besides extracts from the reports of the Special and Select Committees to explain the scope of the amendments and additions—which again is not a new feature. But the chief merit of this edition consists in the cross-references between the various sections of the New Code and the rules and orders in the schedules and forms as also to analogous provisions in different parts of the Code itself. It will take some time before practitioners will get sufficiently familiarised with the disposition of the sections of the old Code. Cross-references between provisions of the New Code are therefore likely to prove particularly helpful to practitioners. The references to standard English works on practice and pleadings and other similar brief notes will add to its usefulness. The Index is also very exhaustive.

BURGE'S COMMENTARIES ON COLONIAL AND FOREIGN LAWS, generally and in their conflict with each other and with the law of England. *New Edition, under the general editorship of Alexander Wood, Renton, of Gray's Inn, Barrister-at-Law, Puisne Justice of the Supreme Court of Ceylon, formerly Judge of Mauritius; and George Grenville Phillimore, B. C. L., of the Middle Temple, Barrister-at-Law. In Five Volumes. Vol. II, London, Sweet & Maxwell, Limited, 3 Chancery Lane, W. C. Stevens & Sons, Limited, 119, 120 Chancery Lane, W. C. Law Publishers. 1908.*

It is not so very long ago that we presented to our readers a review of the first volume of this work (*vide* 11 C. W. N. ccxciii). We recognised in the first volume, which purported to be a general introduction to the whole subject, a valuable contribution to legal literature in the English language. A careful examination of the present volume not only confirms us in that view, but, we may say without hesitation, enhances our estimate of its value. The present volume deals with the Law of Persons and corresponds with the first volume of Burge's original treatise. The present editors modestly state that "the order of the subjects has been slightly changed; the chapters have been freely adapted within their original limits, and new chapters have been added on

Adoption, Parental Power, and Alimentary obligation." Although certain features of Burge's original treatise have no doubt been preserved, and the changes introduced are described as "adaptations," yet the work as a whole as well as in the treatment of details is a new work, and the credit for the very satisfactory manner in which it has been compiled is due to the present editors and contributors. The present volume does not pretend to be an exhaustive statement of comparative legislation on the subjects dealt with nor could it, within its presents limits, be usefully converted into one. We are, however, able to say that the various systems of law have been adequately dealt with under the heads of Civil law, Canon law, Roman-Dutch law, the various systems of Continental law and the systems prevailing within the British Dominions, and the laws of the United States and other American States. Owing to the death of Dr. H. M. Birdwood the contributions on Hindu and Mahomedan Law in this volume are from the pen of Sir E. J. Trevelyan and our readers will be able to judge from these how carefully the details of the work have been worked up. Great importance is very rightly attached to the treatment of the conflict of laws in connection with each of the subjects dealt with. In fact, the very first chapter deals with the subject of "conflict of laws" generally, the special subjects dealt with being Domicile, Aliens, Inferior kinds of Status (under which heading the "Labour Importation in British Colonies" has been very appropriately dealt with as being related to and as having grown out of the status of Slavery) Legitimacy, Adoption, Majority, the Parental Power and the Alimentary obligation. A section is devoted to Private International law in the treatment of each of the last five subjects, whilst the first two deal mainly with that subject. As an up-to-date contribution to Private International Law, especially so far as it relates to "Personal Law," this work would deserve an honoured place in any legal library. In addition to this it constitutes a valuable and reliable collection of materials for the use of students of comparative jurisprudence. The combination of both these elements in the same treatise is especially helpful towards an intelligent appreciation of the principles of Private International Law. A study of the work is bound to widen the outlook of students of law and we trust that no lawyer who can afford the leisure would omit to study this work.

### Notes of Cases.

#### ENGLISH LAW COURTS.

PROBATE DIVISION. [L. R. PROBATE DIVISION, 1908, VOL. II, P. 353].—*In the estate of Deborah Meyer*. Before SIR GORELL BARNES, July 1908.

*Probate, application for—Codicil of one—Execution by another by mistake.*

Two sisters executed mutual Wills. Subsequently according to their instructions their solicitor made two codicils in similar terms, but after the death of one of the sisters, it was discovered that the deceased had signed the codicil which was intended for her sister, and the latter had signed the codicil intended for the deceased.

In an application for grant of probate of the Will and the codicil of the deceased, and which was consented to by the surviving sister,

*Held* that the codicil could not stand inasmuch as the deceased in signing her name to the codicil never intended to do that at all, but intended to put her signature to another document.

*Messrs. Barnard, K. C., and Bayford* in support of the motion.

Solicitors: *Messrs. Lumley & Lumley.*

### CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL APPELLATE JURISDICTION. Before MACLEAN, C. J. and CARNDUFF, J. CRIMINAL APPEAL NO. 703 OF 1908. GOURIDAS NAMSUDRA AND TWO OTHERS, Appellants v. THE KING-EMPEROR. 4th December 1908.

*Indian Penal Code, secs. 302, 326, 323 and 34—“Dying declaration” how to be proved—Complaint whether may be regarded as a statement under sec. 32 (1) of the Evidence Act.*

The Appellants, 3 Namasudras, were convicted by the Sessions Judge of Tipperah who differing from both the assessors found Gouridas and Gurudas guilty of the murder of one Shaheb Ali, and Girish guilty of having caused simple hurt to the deceased. Girish was sentenced to 3 months' rigorous imprisonment under sec. 323, I. P. C., while the sentence on each of the other Appellants was transportation for life under sec. 302, I. P. C. The prosecution case was that Shaheb Ali was waylaid on the 28th May and assaulted by the 3 Appellants out of revenge. The defence story was that the deceased and his brother allowed their cattle to trespass on Girish's field on the 28th May, that Girish seized the cattle and that the occurrence took place there in consequence of the intervention of the deceased and his friends. It was found by the Sessions Judge that the occurrence took place as suggested by the defence owing to the trespass of Shaheb Ali's cattle. He came to the conclusion on evidence that all the 3 Appellants assaulted the deceased and that Gouridas and Gurudas both struck him on the head with



*lathis* and he convicted these two of murder inferring that they must have intended to cause bodily injury likely to result in death. It appears that a statement of the deceased made to the Magistrate was admitted in evidence as a dying declaration without examining the Magistrate who recorded the statement.

Their Lordships observed:—

"Two points of law have been raised and these we will dispose of at once. Shahab Ali was attacked and injured at Srirampore on the 28th May last. On the 29th he went to Brahmanbaria and lodged a petition of complaint before the Magistrate, who examined him on oath, recorded his statement in compliance with the provisions of sec. 202, Cr. P. C., and sent him to hospital where he died on the 31st. The statement recorded by the Magistrate has been treated as a "dying declaration" and it has been proved by the production of the Magisterial record, the learned Sessions Judge holding that, under sec. 91 of the Indian Evidence Act, 1872, no other evidence was admissible. In this connection it is contended:—

(1) that the statement was a complaint and therefore, not a dying declaration; and

(2) that, if it was admissible as a "dying declaration" the Magistrate ought to have been examined to prove its contents, &c.

The statement to the Magistrate was clearly admissible under sec. 32, cl. (1) of the Evidence Act, &c., &c., and it did not cease to be such a statement because it contained a complaint and had, in the circumstances, to be recorded under sec. 202, C. P. C., &c., &c., &c.

A "dying declaration" as such is not a "matter required by law to be reduced to the form of a document"; therefore sec. 91 of the Evidence Act ought not to have been applied."

Their Lordships held that the statement made ought to have been proved by the Magistrate or some one who heard it. (I. L. R. 8 Cal. 211 and 6 C. W. N. 72, followed).

On the facts of the case their Lordships held that the conviction and sentence on Girish were all right, but that as regards the other two Appellants it was not found who struck the fatal blow upon the deceased and that in the circumstances of the case, it could not be held that the Appellant who did not strike the fatal blow must have contemplated the likelihood of such a blow being struck by the other in prosecution of the common object of punishing the deceased for his interference and for the damage done by his cattle. These two Appellants were accordingly convicted under sec. 326, I. P. C., and sentenced to 7 years rigorous imprisonment.

*Babus Dasarathi Sanyal and Devendra Sanyal* for the accused.

*Babus Chhaya Charan Bose* for the Crown.

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and GARNDIFF, JJ. CIVIL RULE NO. 3189 OF 1908. MAHARAJAH SRI RAMESHWAR SINGH BAHADUR, Petitioner v. SONEY JHA. 11th January 1909.

*Civil Procedure Code (Act XIV of 1882), secs. 97, 99A—Refusal to issue summons.*

The suit was brought on the 26th June 1907; the first summons was returned unserved as a wrong address was given; the address was then amended; on three following occasions the summons was returned unserved for shortness of time and on the 4th occasion the Defendant's death was reported; the heir of the deceased Defendant was substituted and the summons on him was unserved for want of an identifier. The Court rejected on the 16th June 1908 Plaintiff's prayer for a fresh summons. This rule was obtained against this order.

It was contended on Petitioner's behalf that the Munsif had no jurisdiction to pass the order he had passed; that sec. 97, C. P. C., did not apply as Court-fee had been paid and that sec. 99A had also no application as the period of one year had not elapsed from the date of suit.

*Held*—That the Munsif had no jurisdiction to reject the application for further summons and that secs. 97 and 99A, C. P. C., had no application. The case was accordingly remanded.

*Babu Jogendra Nath Mookerjee* for the Appellant.

S. C. S.

*Case remanded.*

CIVIL APPELLATE JURISDICTION. Before CASPERSZ and DOSS, JJ. APPEAL FROM ORIGINAL DECREE NO. 564 OF 1908. HARI PROSAD SING AND OTHERS, Defendants, Appellants v. ROMONI MOHON SING AND OTHERS, Plaintiffs, Respondents. 18th December 1908.

*Decree nisi silent about interest after period of grace—Decree absolute cannot allow such interest—Secs. 88 and 89, Transfer of Property Act, and sec. 209, C. P. C.*

The Plaintiffs brought a suit in the Court of the Sub-Judge of Bhagulpur for recovery of Rs. 5,86,038 and odd due on a mortgage bond and a decree *nisi* was passed on the 12th February 1896 allowing six months' time to redeem. On the 31st August 1906 order absolute was made but no decree was drawn up. The Defendants appealed to the High Court against the decree *nisi* but the appeal was dismissed. On the 3rd April 1907 they filed an appeal to the Privy Council, on the ground that the bulk of the properties being in Sonthal Parganas the decree-holders were not entitled under Act of 1872 to any interest in excess of principal amount and the said appeal is pending. Meanwhile the decree-holders



plied for execution of the decree *nisi* and claimed interest at the bond rate up to the date of sale. The judgment-debtors objected *inter alia* that the decree being silent as to future interest the decree-holders were not entitled to that. The Sub-Judge overruled the objection and against that decision there was an appeal to the High Court, heard by Mitra and Caspersz, JJ., on the 5th December 1907, and their Lordships held that upon a proper construction of the decree *nisi* the decree-holders were not entitled to any interest after the period of grace. In pursuance of that judgment a decree was drawn up fixing the amount to Rs. 6,27,494 for which execution could be taken up. Against that decree the decree-holders preferred an appeal to the Privy Council on the ground that the construction put upon the decree *nisi* by the High Court was wrong and the said appeal is pending decision. After filing the said P. C. appeal the decree-holders, taking advantage of two observations in the judgment of the High Court, dated the 5th December 1907, appealed to the Sub-Judge for drawing up a final decree giving them interest and compound interest at the bond rate after the period of grace and up to the date of actual realization. The observations of the learned Judges of the High Court were as follows: "In execution proceeding we can only construe the decree without adding to or subtracting from it though the Plaintiff may yet take the necessary steps to have a proper decree drawn up by a tribunal competent to do so."

It is manifest that the Court omitted to give any direction in the preliminary decree as to future interest; the defect could and ought to have been cured by the final decree absolute for sale but none was drawn up and the Plaintiffs failed to ask the Court to draw up such a decree." The judgment-debtors objected that the Sub-Judge had no jurisdiction to draw up a final decree, and, at least, not a decree giving interest after the period of grace. The Sub-Judge overruled these objections and on the 6th August 1908 drew up a final decree for Rs. 702 by allowing interest at 6 per cent. after the date fixed for payment, *i.e.*, 12th August 1908. Against the said final decree the Defendants preferred the above appeal, but, as the decree-holder applied for execution of the final decree and this sale thereunder was fixed for 21st December 1908 the hearing of the appeal was expedited.

It was contended for the Appellants that the Sub-Judge had no jurisdiction to draw up the final decree allowing interest after the period of grace, the decree *nisi* having been affirmed by the High Court, and the appeal being in the P. C., that, at any rate, the decree *nisi* could not be varied by the decree absolute, and the practical result of the final decree as drawn was to nullify the decision of the High Court, dated the 5th December 1907, which the decree-holders appealed to the Privy Council.

For the Respondents it was urged that the directions made in the judgment of the High Court, dated 5th December 1907, were binding on both parties and the final decree was drawn up according to those observations, that the Transfer of Property Act does not provide for any interest after the date fixed for payment and it was not necessary to provide for a contingency in the decree *nisi* and the question whether there could be any interest after the date fixed for payment only arises when the money is not paid, *i.e.*, when the contract merges in the judgment and future interest can only be allowed by the provision of sec. 209, C. P. C.; see J. L. R. 34 Cal. 150 and I. L. R. 23 All. 181. Hence there could not and need not be any provision as to future interest in the decree *nisi* and the consideration would only arise when the final decree would be drawn up and, therefore, such provision can be added in the final decree. For the Appellants it was pointed out that the judgment in the suit must provide for future interest and the drawing up of the final decree was a ministerial act following from the judgment when the period of grace expires and that the Judicial Committee in the two cases cited were considering the decree *nisi* and they were simply discussing the question whether apart from sec. 88, Transfer of Property Act, interest could be allowed after the period of grace and they relied on the practice of the Courts in India to allow 6 per cent. interest under sec. 209, C. P. C. If sec. 209 be applied to a final decree then the position would be inconsistent.

*Held*—That it was not open to the Court to insert provisions as to future interest, after the period of grace in a final decree, which did not appear in the decree *nisi*. The drawing up of the decree absolute was more or less a matter of a ministerial character. The practice had all along been to insert provision as to future interest in the decree *nisi* itself and that was affirmed by the Privy Council in I. L. R. 34 Cal. 150 and I. L. R. 23 All. 181, having particular reference to sec. 88, Transfer of Property Act.

*Mulvi Shamsul Huda and Babus Kshetra Mohun Sen and Raghu Nath Singh* for the Appellants.

*The Advocate-General, Dr. Rash Behary Ghose, Babus Umakali Mukerjee, Provas Chundra Mitter, Sailendra Nath Palit and Noresh Chundra Sinha* for the Respondents.

A. T. M.

*Appeal decreed with costs.  
Final decree set aside.*

# THE Calcutta Weekly Notes.

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#### REPORTS (See Index.)

THE JUDGMENT OF LORD MACNAGHTEN IN THE appeal of *Mohamed Kala Mèa* from the decision of the Chief Court of Burma, which we report in this issue, is one of those remarkable pronouncements which will considerably enhance the high esteem in which his Lordship is held by members of the legal profession throughout India. Lord Macnaghten evidently believes that it is the duty of the Judges presiding in the highest Court of Appeal not merely to prevent failure of justice in any particular case but also to correct the Courts below by uprooting from their judgments the erroneous principles from which injustice had arisen and may again arise. We know of instances when Lord Macnaghten has not permitted the Crown to urge pleas before him which in the opinion of his Lordship would not be creditable to the Government. His Lordship believes that it is the duty of the Crown to assume a degree of fairness in litigation with private individuals which should be an example to the latter. Similarly, his Lordship maintains in this judgment that what would, perhaps, be excusable in the business world would not be necessarily permissible in transactions which take place in the name and under the supervision of a Court of Justice. In such transactions the highest degree of fairness and fair play ought to be observed by the Court and its officers.

WHEN, THEREFORE, THE PURCHASER OF A PROPERTY was misled by the statement of a Court's auctioneer as regards the material particulars of the property, the Court could not saddle him with the bad bargain on the usual ground that the necessary particulars had been duly published, advertised and kept handy at the sale and that if the purchaser did not care to consult them

he had only to thank himself for his folly. It is a matter of common experience that a certain amount of trickery in purchase and sale goes on in the open market and no one ever seriously questions any bargain made with one's eyes open so long as the transaction falls short of an actual fraud. A reasonable latitude is allowed to an ordinary vendor or auctioneer to extol his goods and one seldom hears of any one going to law for setting aside such sales on the ground of misrepresentation. But all the same a much higher standard of fair dealings is insisted on by law in sales or other transactions of a similar nature when effected through Courts of law. The reason for this is very forcibly put by his Lordship in the following terms:—

• The slightest suspicion of trickery or unfairness must affect the honour of the Court and impair its usefulness. It would be disastrous, it would be absolutely shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconscientious as this.

LORD MACNAGHTEN THEN PROCEEDS TO EXPRESS HIS surprise that the presiding Judge of the first appellate Court should have remarked that the appellant "richly deserved to lose heavily over the transaction." The Judge in making this remark evidently meant that a man who did not take the trouble to ascertain the conditions of sale from the proclamation but relied chiefly on the representations made by the auctioneer deserved no sympathy. But this expression of indignation at the folly of the reckless bidder was quite out of place in a Court of law, especially having regard to the fact that the auctioneer in this particular case was the agent of the Court and the sale was being conducted under the supervision of its officers. His Lordship therefore points out:—

• In sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint of fraud or deceit or misrepresentation is found in the conduct of its ministers.

FURTHER, THE SUGGESTION OF THE JUDGES OF the Burma Chief Court that on the refusal of the purchaser to deposit the usual amount, on the discovery of his mistake, the property should have been resold by the officers of the Court under s. 306 of the Code of Civil Procedure, on the

purchaser's account and that he should have been saddled with the difference, is also dismissed by his Lordship with little ceremony. His Lordship never minces matters in putting things in their proper light and says accordingly:—

If the truth had been published, nobody but a lunatic would have bid on the property being put up again. If the truth had been kept back, there would have been a gross and deliberate fraud. In either case a claim against the present Appellant would have been both dishonest and futile.

IN THE CASE OF *Subramanian Chetty v. Veerabadram Chetty*, reported at p. 442, of I. L. R. 31 Madras Series, their lordships of the Madras High Court (White, C. J. and Wallis, J.) put a construction upon sec. 559 of the Civil Procedure Code which seems to us to be open to question. In this case the Plaintiff sued to recover possession of certain property usufructually mortgaged by the first Defendant to the sixth Defendant's predecessor whose interest was subsequently purchased by the Plaintiff in execution of a money decree. The Plaintiff alleged that the predecessor of the sixth Defendant for the purpose of defeating the Plaintiff's claim against him got the first Defendant to execute a collusive mortgage of the same property in favour of the second Defendant's father who sued on his mortgage and put up the property in suit to sale and it was then purchased by Defendants Nos. 3 to 5. The lower Appellate Court held that the second mortgage was collusive but that Defendants Nos. 3 to 5 were *bona fide* purchasers for value and in this view gave the Plaintiff a personal decree against the second Defendant but dismissed the Plaintiff's suit against the other Defendants. The second Defendant only appealed to the High Court, making the Plaintiff the only Respondent to the appeal. On behalf of the Respondent it was admitted that the decree against the second Defendant could not be supported but an application was made to the Court to bring on the record the other Defendants, who were not added as Respondents, in order to fix them with liability. Accordingly they were brought on the record subject to objection.

AT THE HEARING OF THE APPEAL IT WAS HELD that these latter Defendants could not be added as parties to the appeal under sec. 559, C. P. C., and no decree could be passed against them in the Appellate Court. Their Lordships observed: "looking at the language of the sec. 559, C. P. C., apart from authority it would appear to have been inserted to protect parties to the suit who had not been made Respondents in the appeal from being prejudiced by modifications made behind their backs in the decree under appeal. The party whom it is sought to bring on is

required to be interested in the result of the appeal, that is to say, he must be shown to be interested in the result of the appeal before he is brought on, for once he is brought on he may be said to acquire an interest as a result of being brought on." Their Lordships observe that a Defendant against whom the suit was dismissed is not interested in the result of the appeal preferred by another Defendant against whom the suit was decreed, as the decree or dismissal of the appeal would not affect his interest if he was not made a party to the appeal. In this view their Lordships followed the ruling in *Atmaram v. Balkishen*, I. L. R. 5 All. 267, which was not followed in the case of *Uendra Lal Mukerjee v. Girindra Nath Mukerjee*, I. L. R. 25 Cal. 565. This latter case has been dissented from in the case decided by the Madras High Court.

THE CONSTRUCTION PLACED UPON SEC. 559, C. P. C., by the Calcutta High Court seems, however, to be the more reasonable. The expression "interested in the result of the appeal" is not free from ambiguity; it might mean interested in the result of the appeal as preferred, or it might mean interested in the result that would follow from the appeal. When the Defendant against whom the decree was made prefers an appeal without making the exonerated Defendants parties to the appeal, if the appeal results in the dismissal of the suit against the appealing Defendant, and the Appellate Court holds that the suit might properly have been decreed against the other Defendants, then those Defendants are certainly not persons who have no concern with the result of the appeal. They cannot be ignored, although they had, for no fault of the Plaintiff, not been added as Respondents previously to the hearing of an appeal. So long as the Plaintiff's claim was decreed against one of the Defendants, the Plaintiff had no necessity of preferring an appeal against the Defendants who were exonerated. It was immaterial to him whether he got a decree against the one or the other of the Defendants. It might be that from the nature of his claim, the Plaintiff could not expect a decree against all the Defendants and that it was only possible for him to get a decree against one or the other of them. In such a case the Plaintiff cannot in fairness be expected to prefer an appeal against the exonerated Defendants, for that would amount to an admission on his part that the decree he has obtained against the one Defendant who has appealed is bad in law.

SUCH BEING THE PLAINTIFF'S POSITION, WHEN the decree which he has obtained against one Defendant is set aside in the appeal of that Defendant, he ought to be allowed the liberty of

preferring an appeal *then* against the exonerated Defendants. Under sec. 5 of the Limitation Act, the Plaintiff ought, in such a case, to get an extension of time for preferring the appeal. It is evident that instead of one appeal, there would be then two appeals. But if under sec. 559, C. P. C., the exonerated Defendants could be added as Respondents, the necessity for the Plaintiff's filing an appeal against the exonerated Defendants would be obviated. Neither would the added Defendants be prejudiced by such a procedure. Thus it seems to us that the construction which has been placed upon sec. 559, C. P. C., in the case of *Upendra Lal Mukerjee v. Girindra Nath Mukerjee* has at last the effect of preventing multiplicity of legal actions which is in accordance with the recognised policy of the law. The view of the Calcutta High Court in 25 Cal. is also supported by the case of *Soiru v. Narayan*, I. L. R. 18, Bom. 520 and it was also affirmed in the Full Bench case of *Rap Jaun v. Abdul Kadir*, 8 C. W. N. 496: S. C. I. L. R. 31 Cal. 642.

## THE LAW RELATING TO COMPROMISE.

### I. GENERAL PRINCIPLES.

*Compromise defined.*—'Compromise,' in English law, is a word used (from Latin *compromittere*, to promise) to denote mutual promise by the parties in dispute by the decision of an arbitrator, as well as adjustment of their differences by mutual concessions; either without resort to legal proceedings, or on condition of abandoning such proceedings. (See Wharton's Law-Lexicon, 5th edition, p. 211).

*Principle on which the law of compromise is based.*—The principle on which the law of compromise is based is clearly laid down in the leading case of *Stapilton v. Stapilton*, (White & Tudor's Leading cases, Vol. II, p. 920). It runs thus:—"An agreement entered into upon a supposition of doubtful right, though it afterwards comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties, for the right must always be on the one side or the other and therefore, the compromise of a doubtful right is a sufficient foundation for an agreement." In the case of *Pickering v. Pickering*, (Per Lord Langdale, 2 Beav. 56) Lord Langdale M. R. laid down the rule of law as follows:—"Where parties, whose rights are questionable have equal knowledge of facts, and equal means of ascertaining what their rights really are and they fairly endeavour to settle their respective rights amongst themselves, every Court must feel disposed to support the conclusions or agreements to which they may fairly come at the time, and that notwithstanding the subsequent discovery of some common error."

The agreement will be binding against the parties even if a subsequent judicial decision may prove that their respective rights are different from what they suppose or that one party has nothing to give up, *Lawton v. Campion*, 18 Beav. 87; (see Story on Equity Jurisprudence, 2nd Eng. edition, secs. 121-132). "All that the parties contemplate and desire to effect and deal with, is whether the claim on the one side, or the defence on the other, shall be admitted or not, or whether if both things are *bona fide* brought forward, there may not be some concession on the one side, and some concession on the other side, so as to arrive at terms of agreement, which, if honestly made, is an honest settlement of an existing dispute. If so made a Court of Justice will respect it, and not allow it to be questioned." (Kerr on Fraud & Mistake, 3rd edition, p. 439).

*Essentials of compromise.*—In order to constitute a valid compromise, it is essential, *first*, that some doubtful question of fact or law should have arisen between the parties; *secondly*, that the parties must act in good faith, with honest intention, and with sufficient advice and protection; *thirdly*, that they must have equal means of knowledge of the matter in dispute; *fourthly*, that there must be a full and fair communication of all material circumstances affecting the questions which form the subject-matter of the agreement and which are within the knowledge of some parties, and which the others have no reasonable means of knowing, whether such information be asked for by them or not; and *fifthly*, there must be no fraud or misrepresentation on the part of any party. A party to a compromise who has full knowledge of a fact must not suppress it on the supposition that it is immaterial, inasmuch as the fact so suppressed may possibly influence the judgment of the other party. (Kerr on Fraud & Mistake, 3rd edition, p. 94).

It does not matter whether the doubt is of fact or in point of law, if both parties are in the same ignorance, the compromise is equally binding and cannot be affected by any subsequent investigation, &c., but if the parties are not mutually ignorant, the case admits of a very different consideration, whether the ignorance be of a matter of law or of fact. They will not be bound unless they act with full knowledge of all doubts and difficulties.

But if parties, with full knowledge, will act upon it though it turns out that one gains an advantage from a mistake in point of law, yet if the agreement be reasonable and fair at the time, it shall be binding. And transactions are not in the eye of a Court of Equity to be treated as binding, even as family arrangements, where the doubts existing as to the rights alleged to be compromised are not present to the mind of the party interested. (See Story on Equity Jurisprudence, 2nd Eng. Ed., sec. 131).

**Construction of compromise.**—General words used in a deed of compromise or in a release must be confined to matters of the same nature, and forming part of the transaction which the parties had in view. In the case of *Neelanund Singh v. Hammudoodin* (I. L. R. 8 Cal. 576 at p. 579), the Plaintiff sued B and the heirs of K for rent of an *ijara* for 1283 to 1285. It appeared that K was in the employment of the Plaintiff as *gomasta*; and after his death, the Plaintiff had brought a previous suit against the heirs of K in order to have an account of the money received and disbursed by K during the period of his agency. That suit was terminated by a compromise, dated the 16th of May 1879, and the question to be decided in the last case was whether that compromise was intended to embrace not only the subjects which were then in dispute between the parties but also the claim for rent which formed the subject-matter of the last suit. "I concur with my learned colleague (Cunningham, J.)," observed Field, J., "in thinking that the proper construction to be put upon that compromise is, that it was not intended to embrace the claim which forms the subject of the present suit. It is a general rule of construction that general words in a release are to be limited to that thing or those things which was or were in the contemplation of the parties, see the judgment of Lord Westbury in the case of the *Directors of the London and South-Western Railway Company v. Blackmore*. In that case the words of the release are quite as general as the words which are to be found in the *solenama* in the present case. It was a release of 'all claims and demands therein mentioned and for or on any other account or claim whatsoever.'" In *Gajapathi v. Gajapathi* where a dispute in a Hindu family as to the legitimacy and the right to succession resulted in a family arrangement as to the mode in which the estate was to be held by the son, it was held by the Judicial Committee of the Privy Council that such a document ought not to be construed narrowly by a strict interpretation of the literal meaning of the words, but that the object and the general spirit are the best keys to the interpretation. Where a family arrangement, if construed strictly, would have given an estate, in the event of the death of a younger son to such of the lawful widows as should have male issue, their Lordships held that as such a disposition would contravene the ordinary rules of devolution of property, and be contrary to the usages of Hindus, and as there was no mention of any change of intention as to the proprietary right, a construction which would postpone male issue to their mothers, was inadmissible (13 M. I. A. 497, s. c. 14 W. R. P. C. 33; see *Munhiram v. Sheo Churn*, 4 M. I. A. 114; s. c. 7 W. R. P. C. 29; *Bolakce v. Mahomed*, 14 W. R. 63; *Abdul v. Nuran Bibi*; I. L. R. 11 Cal. 597; *Mahomea*

*Hashim v. Hossein Ali*, 19 W. R. 433; *Tirumalai v. Rangaru*, I. L. R. 21 Mad. 310; *Loknath v. Bissessarnath*, I. L. R. 27 Cal. 103).

**Consideration for compromise.**—In every case of compromise, the actual consideration is not the sacrifice of the rights of the parties but the settlement of the dispute and the abandonment of the claims advanced by each party. If, for example, A & B claim adversely to each other the property of a deceased person C, and with a view to avoid going to law, agree to divide the same, a Court of Justice will not afterwards allow the agreement to be set aside on the ground that only one was the heir of C and that he gave up the right which he really possessed; the fact, that the other may have no claim being immaterial, provided he be honestly mistaken as to his claim. It is quite sufficient, if at the time when the compromise was made he honestly believed that he had a claim, and the parties had by the transaction avoided litigation. (See Kerr on Fraud & Mistake, 3rd Ed., p. 438; 2 Beav. 56).

**Specific enforcement of compromise.**—A bona fide compromise of some doubtful claim or right is good even though it may not be sustainable at law. If one person honestly believe that he has a claim against another and forbears to press it at the request of the latter, this is a good consideration for a contract between the two, although the claim may really be groundless. The Court will specifically enforce the compromise, and in doing so, will not enquire into the validity of the claim on which it is founded. See Chitty on Contracts, 14th Ed., pp. 24-25; Fry on Specific Performance of Contract, 4th Ed., p. 662. A mistake, therefore, on the part of one of the parties regarding his right will probably be of no avail as a defence to an action for specific performance, but the compromise may have been made under such mistakes regarding other matters of fact as may induce the Court to refuse enforcement of it. (Fry on Specific Performance, &c., p. 662, sec. 1579). As to cases where specific performance was allowed, see *Ram v. Prayag*, I. L. R. 8 Cal. 138; *Radhajiban v. Taramoni*, 12 M. I. A. 380 and *Lalji Sahu v. Collector of Tirhoot*, 15 W. R. P. C. 23. A compromise entered into in a former suit, no fraud being alleged, is not annulled by non-performance by one of the parties. The other party may sue for its enforcement, but they cannot revert to their original right. *Ram v. Dhunoodhari*, 1 W. R. 266. A compromise must be treated as a new and positive contract, and the breach of its stipulation may be ground of a suit for its enforcement, but not for a revival of the original right. *Bishun Kumar v. Hurish Chundar*, 2 W. R. 209.

**Setting aside compromises.**—A compromise may be set aside on the ground of fraud, concealment, mistake and the like.

**Fraud.**—In the case of *Brooke v. Mostyn*, 34 L. J., Ch. 65, (see Kerr on Fraud & Mistake, 3rd Ed., p. 438; see also Roscoe on *Nisi Prius* Evidence, 18th Ed., p. 283) it was held that a compromise of doubtful rights will not be set aside on any other ground than fraud. When a claim is once compromised and a new contract entered into the promisor is estopped from pleading illegality or absence of consideration for the new contract, the real consideration for it being the withdrawal of the claim itself, irrespective of the possibility of its being prosecuted to a successful issue. The new contract can only be questioned on the ground of fraud, such as want of good faith in making the claim compromised. *Varajlal v. Dalsukh*, 12 Bomb. H. C. 196. In a suit for setting aside a *solenama* on the ground of fraud and duress, these must clearly be proved. It is not sufficient to say that it is a case of doubt; that it is not perfectly clear that the party seeking to set aside the compromise is a free agent; that there may be suspicions on the conduct of the other party; or that there is a possibility and that there may be ground for the conclusion that it is not his own act. These are not sufficient; mere possibility, or even to go further, probability, that there may have been such an origin of the transaction, is not sufficient to entitle the Court to set aside the compromise. 1 M. I. A. 1 at p. 17. In the case of *Rajunder Narain Rao v. Bijai Govind Sing*, 2 M. I. A., p. 181, it was held by the Judicial Committee of the Privy Council that a *solenama* entered into in the presence of witnesses and solemnly acknowledged in Court by parties who were mutually ignorant of their legal rights, cannot afterwards be set aside upon the plea of ignorance of the real facts, where the party seeking to avoid the deed had the means of ascertaining those facts within his reach. Gross fraud and imposition are not to be imputed on mere suspicion, and unless the charge is proved, a party cannot be released from an agreement entered into by his own solemn act.

**Concealment.**—A compromise is vitiated by concealment. It cannot stand in a case where one party cannot know more than what the other party chooses to let him know. A valid compromise requires that the doubtful right should be equally known by the other party. Parties should communicate to each other all the material facts bearing on the matter in dispute. There must be full disclosure (See Kerr on Fraud and Mistake, p. 94.) If the party who seeks to set aside the compromise is ignorant of his right to the estate, or if his right is concealed from him by the other party, this would be a good reason for setting aside the compromise. See Story on Equity, &c., p. 78. In the case of *Turner v. Green*, 2 Ch., p. 205, it was, however, laid down by the Court that mere silence regarding a material fact which one party is not bound to disclose to the other is no defence to a

suit for specific performance of a compromise. See Kerr on Fraud, &c., p. 95.

**Mistake.**—Does mistake vitiate any compromise of doubtful right? Mistakes are of two kinds, *vis*, (1) mistake of law, and (2) mistake of fact. As a general rule, a compromise is vitiated by a mistake of fact, but not by a mistake of law. See Kerr on Fraud, &c., pp. 437, 438. Story (See Story on Equity, &c., sec. 121) has drawn a distinction between clear and plain law, and doubtful law. According to him, if a party acting in ignorance of a plain and settled principle of law, is induced to give up his indisputable property to another under the name of a compromise, a Court of Equity will relieve him from the effect of his mistake. But where a doubtful question arises, such as a question regarding the true construction of a Will, a different rule prevails, and a compromise fairly entered into, with due deliberation, will be upheld in a Court of Equity as reasonable in itself, to terminate the differences by dividing the stake, and as supported by principles of public policy. See Story on Equity, &c., sec. 121. When there is a plain and established doctrine on the subject, so generally known, and of such constant occurrence as to be understood by the community at large, as a rule of property, such as the common canons of descent, there, a mistake in ignorance of the law, and of title founded on it, may well give rise to a presumption that there has been some undue influence, imposition, mental imbecility, surprise or confidence abused. But in such cases, the mistake of the law is not the foundation of the relief, but is the medium of proofs to establish some other ground of relief. Story on Equity, &c., sec. 128. According to Kerr, a compromise of some doubtful right is not vitiated by any mistake of law if the parties were really in doubt and difficulty at the time of the compromise. See Kerr on Fraud, &c., p. 437. In his opinion, if two parties having or supposing to have claims upon a given subject-matter or claims against each other, agree to compromise these claims, and if they have equal knowledge or means of knowledge regarding the matter in dispute, and if there is no fraud or misrepresentation, the transaction is valid and binding, although if the matter had been fought out in a Court of Justice, it might have come to a different conclusion.

#### CURRENT INDIAN CASES.

**KHASABA v. CHANDRABHAGABAI**, I. L. R. 32 Bomb. 441. *Transfer of Property Act (IV of 1882), sec. 123—Gift—Registration.*

A gift of immoveable property duly made by means of a registered deed is not invalid merely because registration of the deed of gift may have taken place after the death of the donor.



LAXMAN LAL v. MULSHANKAR, I. L. R. 32 Bom. 449. *Contract Act, sec. 23—Consideration—Public policy—Criminal prosecution.*

A sale-deed and a rent-note not executed by an accused on consideration of indemnifying his pleader who stood surety for him was held to be void under sec. 23 of the Contract Act and a suit for rent thereupon was dismissed.

PAWADEWA v. VENKATESH, I. L. R. 32 Bom. 455. *Hindu Law—Exclusion from inheritance.*

A widow having succeeded to the inheritance in exclusion of an unqualified son is not divested by a qualified son born afterwards to the unqualified son.

KARSONDAS v. GANGARAI, I. L. R. 32 Bom. 479. *Hindu Law—Joint family—Res judicata.*

"The fundamental principle of the Hindu joint family is the tie of sapindaship. Without that it is impossible to form a joint Hindu family."

The first care of the Hindu lawgiver was to perpetuate religious observances, to perpetuate therefore the family as a permanent unit of which each succeeding generation was under sacred obligations to perform religious obsequies for the benefit of ancestors.

"It would be indecent and impertinent for an inferior Court to go again into a question which upon full argument had been twice decided by Courts superior to it, and on the last occasion by the Supreme Court."

The law relating to joint property, joint family property and joint ancestral property discussed.

DATTO v. PANDURANG, I. L. R. 32 Bom. 499. *Hindu Law—Adoption—Power of Hindu widow.*

A Hindu widow who succeeds to an estate not as her husband's heir, but as a *gotraja sapinda* of the last male holder under the rule established by *Lullobhoy Bappobhoy v. Cassabai*, L. R. 7 I. A. 212 and in consequence of failure of nearer heirs, such as the mother and grandmother, cannot make a valid adoption.

## Review.

THE LAW OF BANKING. By Sir John R. Paget, Bart, K. C. Second Edition. Butterworth & Co., Law publishers. Bell Yard, Temple Bar, London. 1908.

On the publication of this work by such a recognised authority on banking matters as the author in 1904, it had to be reprinted within a few months. The present is, however, the second edition of the work published towards the end of the last year. In the intervening period momentous changes have taken place in the Law of Banking. Owing to the decision in the case

of *Capital and Counties Bank v. Gordon* [1903] A. C. 240, the Bill of Exchange (Crossed Cheques) Act of 1906 was passed, which has relieved bankers from the serious consequences of that decision. The work has been revised and rearranged with special reference to the changes in the case law and statutory law. The discussion in this work of the recent decisions of the Judicial Committee is sure to prove of special interest to Indian readers. The interpretation of the law by the Judicial Committee is of binding authority on the Indian Courts. But though in England they are regarded as weighty pronouncements yet they are not equally binding on the English Courts. We may draw the readers' attention in this connection to Chap. VII, where the subject of "marking cheques" is dealt with. The view of the Judicial Committee is that it amounts to adding the credit of the drawee bank to that of the drawer. But the author explains that such "marking" does not amount to an acceptance by the banker and does not render the banker liable to the payee or the holder. The chapter on forgeries (Chap. XIV) in this work will be found of particular interest both by lawyers and business men especially having regard to the criticism by the author of the much discussed decision of the Judicial Committee in the case of *Colonial Bank of Australia v. Marshall* [1906] A. C. 559. We must confess that our views regarding this case are much in agreement with those of the author. The learned author, on the one hand, dismisses with little ceremony the attempt to fix liability on customers in respect of forged cheques on the plea of "estoppel by negligence." A multitude of sins is often sought to be covered by this charmed legal term and the author does well to refer back to *Vagliano's case* [1891] A. C. 107, and to state definitely that in order that the plea of estoppel might prevail it must be shown that the customer had actively misled the bank by paying a forged cheque in any of the ways exemplified in that case. The careless keeping of a cheque book, the lack of supervision over an agent and pleas of the like nature for fixing liability on the customer for forged cheques are certainly too absurd to admit of serious consideration. But the doctrine that there can be "no obligation on any person to anticipate crime" as applicable to forged cheques has, in the opinion of the author, been pushed in the case of *Colonial Bank of Australia v. Marshall* to an absurd length. It is difficult to see why the bank should be made responsible for payment without any negligence of a cheque in which a blank was intentionally left before the words and figures by one of the executors who after getting the signatures of his co-executors signed it after raising the amount in figures and words in such a manner that no reasonable person could suspect that anything was wrong in the

cheque. The review of the law by the author in this respect with special reference to *Young v. Grote*, 4 Bing. 253 and *Scholfield v. Londesborough* [1896] A. C. 514, is very suggestive. The fact that Lord Halsbury and Lord Macnaghten were parties to the decision in the colonial case in the Judicial Committee has attached to it almost the finality of a House of Lords' decision. Hence the author has spared himself no trouble to point out not only the unreasonableness of the decision but its inconsistencies with those decisions of which it is said to be a legitimate offshoot.

In conclusion, we would only add that on all complex questions arising out of banking transactions one cannot do better than keep this work at his elbow for ready reference.

**BANKING AND CURRENCY.** By *Earnest Sykes B.A. (Oxon)*. Butterworth & Co., Law Publishers, Bell Yard, Temple Bar, London. 1908.

This is an elementary book on the subject, intended for candidates who offer themselves for examinations held under the auspices of the Institute of Bankers and the London Chamber of Commerce. The first seven chapters of the work attempt to explain the economic laws of currency with special reference to the currency system in England incidentally dealing with the French system. The experiment with the currency system of India on which the Government of India have launched themselves within the last decade is a sealed subject to many of the lay public. It may be fraught with serious consequences to the people of this country, how and why, it is difficult to divine for those who have not given any serious thought to the subject. Those interested in this subject, as every one ought to be, will do well to commence its study with this little book. Every one who has had any dealings with Banks will also profit by the study of Chaps. XIV to XVIII which deal with such subjects as "Relations of Bankers and Customers," "Endorsements," "Revocation of Customer's Authority," "Bankers and Borrowers, &c." We notice that the recent leading cases in connection with these subjects are noticed in this work. The book is sure to prove a very useful guide to those engaged in banking business as also to private individuals.

## Notes of Cases.

### \* CALCUTTA HIGH COURT.

\* Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

**CRIMINAL REVISIONAL JURISDICTION.** Before HOLMWOOD and RYVES, JJ. **CRIMINAL REVISION** No. 1282 OF 1908. **RAM KRISHNA MAHA-PATRA AND OTHERS**, Petitioners, first Party *v.* **EMPEROR**. 14th January 1909.

*Criminal Procedure Code (Act V of 1868), sec. 107—Two opposite parties proceeded against in one proceeding, illegal—Existence of litigation no legal ground for binding down parties to keep the peace.*

The material facts of the case were that the Petitioner Ram Krishna Mahapatra and four others received a notice, dated 22nd May 1908, to show cause why they should not execute a bond for Rs. 200 with one surety in Rs. 200 to keep the peace for one year only. In the said notice the Petitioner and 4 others were made first party any Raghu Mahanti and 3 others were made 2nd party. It ran as follows:—"Whereas it has been made to appear to me from the Police report, dated 7th May 1908, that you the members of the 1st party and you the members of the 2nd party have ill-feeling between you in respect of landed property belonging to the deceased Mohunt of Gopalpur and that consequently you are likely to commit a breach of the peace or disturb the public tranquility or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquility in village Gopalpur you the members of both the parties therefore are hereby called upon to show cause on the 3rd June 1908 at Puri in person or by duly authorised agent before me why you the members of both the parties should not each execute a bond for Rs. 200 with one surety in Rs. 200 to keep the peace for one year only." The 2nd party in shewing cause denied that they had any interest in the properties mentioned in the notice but referred to certain litigation going on with the Petitioners. The Deputy Magistrate found that the quarrel appeared to have originated from Ram Krishna Mahapatra getting the proprietors of Gopalpur *muth* to execute a deed of gift in his favour and coming into possession of the *muth* properties.

He also found that after that Ram Krishna Mahapatra had a criminal case instituted against some of the 2nd party through his man, Ram Chandra Das, but the case was dismissed and he had to pay compensation under sec. 250, Cr. P. C. Then Ram Krishna instituted a civil suit for damages which was pending and also Arjun Mahanti, a member of the 2nd party, brought a criminal case of trespass which was pending. He therefore held that there was a likelihood of a



breach of the peace and therefore ordered that Ram Krishna Mahapatra of the 1st party and 3 others of the 2nd party, should each execute a bond in Rs. 100 with one surety in Rs. 100 to keep the peace for one year only.

Against the said order an appeal was preferred by Ram Krishna Mahapatra to the District Magistrate of Puri who affirmed the judgment of the first Court and further held that "even the getting instituted a complaint found to be frivolous or vexatious" was sufficient to justify binding down the Appellant.

The Petitioner Ram Krishna Mahapatra of the 1st party obtained this rule on the District Magistrate of Puri to show cause why the order binding the Petitioner down to keep the peace which was upheld by him on the 17th July 1908 should not be set aside on the grounds, first, that the two opposite parties cannot be bound down to keep the peace in a single proceeding and secondly that the existence of litigation between the parties is not in itself a legal ground for calling upon them to execute bonds to keep the peace.

*Babu Atul Krishna Ray* for the Petitioners referred to *Pran Kristo Sahu v. Emperor*, 8 C. W. N. 180 and *Kamal Narain Choudry v. Emperor*, 11 C. W. N. 472; s. c. 5 C. L. J. 231 and *Subramaniya Aiyar v. Emperor*, 1 L. R. 25 Mad. 61 in support of the rule on the first ground and with regard to the second ground he contended that persons who came to Court for redress were the last persons to break peace.

Their Lordships held—That the Magistrate acted without jurisdiction in binding down two contending parties to keep the peace in a single proceeding.

Held further—That the "getting instituted a complaint declared to be false and frivolous" was no legal ground for binding down the person who caused the institution of the complaint.

B. C.

*Rule made absolute.*

**CIVIL APPELLATE JURISDICTION.** Before SHARFUD-DIN and COKE, JJ. APPEAL FROM APPELLATE DECREE No. 2342 OF 1906. RAHIMUDDI MUNSHI, Plaintiff, Appellant *v.* NALINI KANTA LAHIRI AND OTHERS, Defendants, Respondents. Heard, 6th January 1909. Judgment, 12th January 1909.

*Revenue Sale Law (Act XI of 1859), secs. 13, 37, 54—Adverse possession—Share of an estate.*

The suit related to a *chur* known as Chur Bansa which was originally an accretion to the village Bansa, situated in estate No. 6 called Dibi Fatehpur. Government surveyed the *chur*, found that a certain portion fell within estate No. 6, and released it to the proprietors of that estate. The remainder was formed into a separate estate, numbered

407, and settled with the then proprietors of estate No. 6.

Subsequently various separate accounts were opened in No. 407 and ultimately the residuary or *imlali* share of 6 annas odd fell into arrears and was sold under Act XI of 1859. It was purchased by the Plaintiff. The Plaintiff also obtained a *putni* of another share of 3 annas odd from the Defendants Nos. 8 to 10, who were said to be the maliks of that share. The Plaintiff brought this suit for possession, praying that estate No. 407 might be ascertained, and that when it had been ascertained, he might obtain his share in it by partition.

Both the Courts below held that the suit was barred by limitation and the Plaintiff appealed to the High Court.

As regards the share of 3 annas, the Respondents were some of the proprietors of No. 6 and purchasers from them. Their case was that they had obtained a title to the lands in suit by adverse possession, inasmuch as they had occupied the lands for more than 12 years, though they were the proprietors, not of No. 407, but of No. 6.

As to the 6 annas share the view of the Courts below was that the adverse possession of the Defendants had extended over a period of more than 12 years before the purchase by the Plaintiff at the revenue sale, and that therefore the Defendants had acquired a title which could not be impugned by the Plaintiff, whose rights were those conferred by sec. 54 and not those conferred by sec. 37 of Act XI of 1859.

Held—That the suit was not barred by limitation. The purchaser of a share at a revenue sale is entitled to that share, even if a person other than the recorded proprietor has acquired a title by 12 years, adverse possession previously to the sale. Hence the adverse possession of the Defendants before the revenue sale could not affect the Plaintiff's purchase of the share, and no question of limitation could arise, the suit having been instituted by the Plaintiff a little more than 2 years after his purchase.

*Kumar Kalanand Singh v. Syed Sarafat Hussain* (12 C. W. N. 528) followed.

*Kerim Khan v. Brojo Nath Das* (1 L. R. 22 Cal. 244) distinguished.

In a sale under sec. 13 of Act XI of 1859, it is not the rights of the recorded proprietor, that pass, but the share itself.

*Bhowaffi Koer v. Mathura Irasad* (7 C. L. J. 1) followed.

*Babus Mahendra Nath Ray and Shyama Prosomo Ray* for the Appellant.

*Babus Mohini, Mohun Chuckerbutty and Hira Lal Sanyal* for the Respondents.

A. T. M.

*Appeal allowed.*

# THE Calcutta Weekly Notes.

Vol. XIII.]

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[No. 12]

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### REPORTS (See Index.)

WE NOTE THAT R. F. RAMPINI, ESQ., LATELY Senior Puisne Judge and sometime Officiating Chief Justice of the Calcutta High Court, has been knighted by His Majesty the King under the name of Sir Robert Fulton Fulton, as will appear from the following notification in the Gazette of India of the 30th January 1909.

The 29th January 1909.—No. 235 I. B.—The following extract from a Notification which appeared in the "London Gazette" dated the 18th December 1908, is republished for general information—

Whitehall, December 17, 1908.—The King was pleased, on Monday, the 14th instant, to confer the honour of Knighthood upon the undermentioned gentlemen at Buckingham Palace

Robert Fulton Fulton (formerly Rampini) Esquire, late Senior Puisne Judge of the High Court of Judicature at Fort William in Bengal

THE HON. MR. JUSTICE BRETT AND THE HON. Mr. Justice Holmwood have been granted furlough from 27th March to 2nd September 1909.

LORD LOREBURN'S BILL, TO WHICH WE HAD DRAWN attention in our issue of the 7th of December 1908 as making some changes in the constitution and practice of the Judicial Committee of the Privy Council, has now taken the form of a Statute under the name of the Appellate Jurisdiction Act of 1908 (8 Edw. 7, Ch. 51) which we publish in another column. We presume, Sir John Edge has been appointed member under this new Act.

IN ANOTHER COLUMN APPEARS A REVIEW OF THE case-law dealing with the question of the effect of sales in execution of decrees obtained by the landlord or a co-sharer landlord against a recorded tenant upon the interest of his unrecorded co-sharers, with reference to the judgment of Wilson and O'Kinealy, JJ., which we reported in the last number, *Doorgadhur Biswas v. Huro Mohinee*, 13 C. W. N. 270.

WE INVITE ATTENTION TO AN INSTRUCTIVE NOTE in the last December number of the *Harvard Law Review* regarding the interesting question of the power of law Courts to deal with rights of property incidentally involving political questions, as suggested by the report in our columns of the case of *Samarendra Chandra Deb Barman v. Birendra Kishore Deb Barman* (12 C. W. N. 777). We publish a verbatim reprint of this note below. This criticism, placing reliance on the more reasonable but dissentient view of Chief Justice Taney in *Rhode Island v. Massachusetts*, supports the view of the Calcutta High Court that as the suit was brought not to try any present right in the land within British territory but to settle the succession to a foreign sovereign it was not maintainable. But at the same time it will be noticed that both the note and the authorities cited are agreed that "a foreign sovereign having property within the jurisdiction is amenable to the Court's control, since by becoming the owner of the property he has incorporated himself into the juridical system under which he holds it." In fact the American authorities are in this respect in perfect agreement with the view of the Judicial Committee of the Privy Council in the case of *Neel Kristo Deb Barmono v. Bger Chandra Thakoor*, 12 M. I. A. 523. In this note the above case is put down as an authority for the proposition "municipal Courts may determine the title to property situated within their jurisdiction, though a political question is involved" But the Calcutta High Court's reading of the law as laid down in the above case would seem to be somewhat different in *Samarendra v. Birendra*. When the latter comes up on appeal before the Judicial Committee of the Privy Council, we shall await with interest their Lordships' opinion on this important question.

### POWER OF THE JUDICIARY OVER CONTROVERSIES INVOLVING POLITICAL QUESTIONS.

Since the time of Littleton it has been established law that the decision of political questions is without the province of the Courts. (Wambaugh's Littleton's Tenures, Introd. xxxiv, xxxv.) But a difficulty arises in determining what are political questions. In this country they would seem to be questions expressly reserved by the Constitution to either the executive or the legislature, and the question which are by the necessary implication

of the Constitution so reserved—that is, questions the decision of which by the judiciary would obviously embarrass the action of the executive and legislature within their respective spheres, or which, owing to the superior sources of knowledge of the other two branches, the Courts are ill-qualified to decide. Among such are questions as to the jurisdiction of different sovereignties [*Williams v. Suffolk Ins. Co.*, 13 Pet. (U. S.) 839; *State v. Wagner*, 61 Me. 178; *Foster v. Neilson*, 2 Pet. (U. S.) 253], the duly constituted government of a state [*Luther v. Borden*, 7 How. (U. S.) 1], and the status of Indian tribes [*Farrel v.* (U. S.), 110 Fed. 942, 951].

A crucial issue arises where a Court is called upon to determine the rights of individuals to property within its jurisdiction when the decision necessarily involves the determination of a political question. As to international questions it is a well-settled rule of international law that municipal courts may determine the title to property situated within their jurisdiction, even though a political question is involved. [*Neel Kisto Deb v. Beer Chunder*, 12 Moore's Ind. App. 523, 534.] Accordingly, a foreign sovereign having property within the jurisdiction is amenable to the Court's control, since by becoming the owner of the property he has incorporated himself into the juridical system under which he holds it and since a suit against him can be carried on without interfering in any way with any property necessary to the proper discharge of his functions as a sovereign. [*The Charkieh*, L. R. 4 Ad. & Ecc. 59, 97.] In accord with this rule is the opinion of a recent case in India which confirms the right of the Courts of British India to adjudicate the title to property situated therein belonging to a native prince not subject to the Court's jurisdiction, in spite of the fact that the rules governing the descent of the property were the same as those governing the succession to the throne. But, on finding that the real object of the suit was to settle the succession, and that the property right involved was only contingent, the Court denied its jurisdiction. *Shamarendra Chandra Deb Barman v. Birendra Kishore Deb Barman*, 12 Calcutta W. N. 777 (Calcutta High Ct., May 21, 1908).

Similarly the United States Supreme Court has held that a mere assertion of property rights will not give jurisdiction over a political question, where the assertion is merely added for the purpose of giving jurisdiction [*Georgia v. Stanton*, 6 Wall. (U. S.) 50]. Accordingly, it would appear necessary that the property rights be not remote. Yet the Supreme Court held in a leading case that in boundary disputes between the states, the state's right of escheat to the property within its borders is a sufficient property right to render the question one for the judiciary, and that the sovereignty and jurisdiction of the state is merely incidental to the property rights involved. [*Rhode*

*Island v. Massachusetts*, 12 Pet. (U. S.) 657 734. See also *Georgia v. Stanton*, *supra*.] The English cases relating to counties palatine [*Derby v. Athol*, 1 Ves. 201; *Bishop of Sodor and Man v. Derby*, 2 Ves. 337, 355] and to colonial governments [*Penn v. Baltimore*, 1 Ves. 446; *Nabob of the Carnatic v. E. India Co.*, 1 Ves. Jr. 370] are cited as authority for this position. But in those cases the English Courts had jurisdiction, not of causes between states, but of causes arising out of agreements between English subjects, who, residing within the jurisdiction of the English courts, were, as English subjects, amenable to the processes of those courts. It is further reasoned [*Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 657, 737] that a political question becomes a judicial one when submitted to the courts; but this reasoning should not have been applied where the defendant state submitted to the Court's process by appearing and pleading, and then later moved a dismissal for want of jurisdiction. Cf. *ibid.* 719. The decision of the Supreme Court that its jurisdiction extends over boundary disputes between the states is settled law. [*New York v. Connecticut*, 4 Dall. (U. S.) 4; *New Jersey v. New York*, 5 Pet. (U. S.) 284; *U. S. v. Texas*, 143 U. S. 621; *Virginia v. West Virginia*, 11 Wall. (U. S.) 39, 53; *Mississippi v. Louisiana*, 202 U. S. 1. See also 16 Harv. L. Rev. 134.] It is submitted, however, that the dissenting opinion of Chief Justice Taney [*Rhode Island v. Massachusetts*, *supra*, 752, 754] in the leading case contains the preferable view—that such disputes are political questions where the suit is not brought to try a right of property in the soil, but is rather brought to enforce the mere political jurisdiction of the state.—*The Harvard Law Review*.

## THE LAW RELATING TO COMPROMISE.

### II. FAMILY COMPROMISE.

*Family compromise.*—The principles already discussed are also applicable to family compromises. The essentials requisite for the validity of compromises in general are extremely necessary in compromises of this kind. A full and fair communication to each other of all material circumstances is necessary. Any omission to do so even without any wrong motive or intention vitiates the compromise. There must be a full disclosure of all material facts, and without it, a mere honest intention is unavailing and does not support the compromise. (Story on Equity &c., sec. 121). So far as the foregoing principles are concerned, there is no distinction between a family compromise and a compromise in general, and the rule of law governing the latter will not be relaxed by any Court of Equity in the case of the former in its solicitude for preserving the peace and quietness of a family. (See Kerr on Fraud & Mistake,

3rd Ed., p. 95). Story, however, seems to take a more lenient view. According to him, a Court of Equity will, in cases of family arrangements, administer an equity not applicable to compromises generally. (See Story on Equity Jurisprudence, sec. 132). Family compromises, if fairly and reasonably made, and if there be no fraud with a view to save the honour and peace of a family and to prevent family disputes, are upheld with a strong hand, and are binding when, in cases between mere strangers, the like agreements would not be enforced. (See Story on Equity Jurisprudence, sec. 132). Then, in the case of *Williams v. Williams* (I. L. R. 2 Ch. App. 294, 304) Turner, L. J., remarked as follows:—"They (that is, family agreements) extend not merely to cases in which arrangements are made between members of a family for the preservation of its peace, but to cases in which arrangements are made between them for the preservation of its property..... and certainly in these cases, this Court does not enquire into the question of consideration."

.....*Indian decisions.*—In the case of *Lakshmi Bai v. Ganpat* (5 Bom. H. C. 128) Couch, C. J., said:—"In order to constitute a binding family arrangement, it is not necessary that there should be any formal contract between the parties, and if sufficient motive for the arrangement is proved, the Court will not consider the quantum of consideration; *William v. Williams* (L. R. 2 Ch. Ap. 294). The fact that by their agreement the parties have avoided the necessity for legal proceedings, is a sufficient consideration to support it; *Partridge v. Smith* (9 Jur. N. S. 742), *Naylor v. Winch* (11 Sm. & St. 554)." In the case of *Dharmaji Vaman v. Gurnav Shrinivas* (10 Bom. H. C. 311), it was held by the Bombay High Court that when parties enter into a family arrangement or compromise in order to avoid litigating the question as to whether one of them is entitled to certain property or not, such compromise will not be set aside, although it should eventually turn out that the party taking something under the compromise is in reality legally entitled to nothing. In the case of *Helan Dasi v. Durga Das* (4 C. L. J. 323; see also Caspersz on Estoppel, Tagore Law Lectures, 1893, 2nd Ed., p. 75), the Calcutta High Court held that a family arrangement made in settlement of a doubtful, if not a disputed, claim by arbitrators appointed by the parties, effecting a division of the family properties and debts, and carried out and acted upon by them for some time, is a valid and binding arrangement which the parties to it cannot ignore or resile from. In the above case, Mr. Justice Mukerjee fully discusses the rule of law regarding family compromises thus:—"If parties have settled a dispute, such settlement will not be set aside on the ground that it gives to one of the parties more than what he might possibly have recovered, if he had taken

the judgment of the Court upon the matter then in difference between them. A family arrangement may be upheld although there were no rights actually in dispute at the time of making it, and the Court will not be disposed to scan with nicety the question of consideration. It is a mistake to suppose that the doctrine of family arrangement extends no further than arrangements for the settlement of doubtful or disputed rights; the principle is applicable not merely to cases in which arrangements are made between members of a family for the preservation of its peace, but also to cases in which arrangements are made between them for the preservation of its property. The validity of a family arrangement does not depend on the length of time for which it has been acted upon. A fair compromise of doubtful right is in itself a sufficient foundation for the agreement. But if an attempt is made to set aside a family agreement on the ground of mistake, inequality of position, undue influence, coercion, fraud, or any similar ground, the length of time during which it has been allowed to stand unchallenged may be a material ground for consideration."

### III. CAPACITY TO MAKE COMPROMISE.

.....*Compromise between infant and adult.*—In the case of *Hargrave v. Hargrave* (12 Beav., p. 411; see Fry on Specific Performance, 4th Ed., p. 663n), Lord Langdale, M. R., observed that the Court of Chancery would not enforce a contract for compromise between an infant and an adult, there being no mutuality.

.....*Compromise by guardian on behalf of minors.*—Compromise of claims or of suits may be made on behalf of minors by their guardians.

.....*of claims.*—No compromise of claims or any family arrangements made by a guardian on behalf of his ward will be upheld by the Court unless there is proof of necessity or of clear benefit to the latter. (See Trevelyan on Minors, Tagore Law Lectures, 1877, 3rd Ed., p. 205; see *Roshun v. Enaet*, 5 W. R. 4; *Budhmul v. Gouree*, 4 W. R. 71; *Venkataramayya v. Rangamma*, I. L. R. 15 Mad. 498; *Nirvanaya v. Nirvanaya*, I. L. R. 9 Bom. 365). If the compromise is to be binding upon the minor, it must be made in good faith, *Mukbul Ali v. Masnud Bibi* (3 B. L. R., A. C. J. 54), and must as well be free from fraud (*Ram. Autor v. Mahammad Mumtaz Ali Khan*, I. L. R. 24 Cal. 853 (P. C.)). Where the guardian is appointed by the Court and where he seeks to assign any immoveable property of his ward by the compromise, previous permission of the Court must be obtained by the guardian (Act VIII of 1890).

.....*of suits.*—No compromise entered into by the next friend or guardian of a minor Plaintiff is valid unless it is for the benefit of the latter

(see Roscoe on *Nisi Prius* Evidence, 18th Ed., p. 283, *Rhodes v. Swithenbank*, 22 Q. B. D. 577 C. A.). The Code of Civil Procedure (Act XIV of 1882, sec. 462; Act V of 1908, Order 32, rule 7) does not apply except where there is an existing guardian and pending litigation; *Vithaldas v. Duttaram*, I. L. R. 26 Bom. 298. It enacts that no next friend or guardian for the suit, shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. Any such agreement or compromise entered into without the leave of the Court shall be voidable against all parties other than the minor." This agreement or compromise includes a compromise made after decree and embodied in the decree (*Majhis Sahai v. Narain Bibi*, 7 C. W. N. 90), also the withdrawal of a suit (*Doraswami v. Thungasami*, I. L. R. 27 Mad. 377), as well as the waiver of a right to an account (*Sarat v. Netye*, I. L. R. 27 Cal. 1013, 1021). The compromise may be set aside by an application for review or by a regular suit (see *Karmali v. Rahimbhoy*, I. L. R. 13 Bom. 137, see also 10 C. W. N. 529) but not by an appeal from the decree on the compromise (*Rakhhal Moni v. Adwyte Prosad*, I. L. R. 30 Cal. 613) or in execution proceeding (I. L. R. 12 Mad. 503). The above provision makes any such compromise entered into by the guardian without the leave of the Court voidable by the minor (see Trevelyan on Minors, 3rd Ed., p. 318; see also *Rakhhal Moni v. Adwyte Prosad*, I. L. R. 30 Cal. 613), and even if leave is obtained, the minor may dispute its validity on the ground that the leave was obtained by fraud or by concealment of material facts. (See *Solomon v. Abdool Azeez*, I. L. R. 6 Cal. 687).

.....*leave of Court to be express*.—The leave of the Court must be obtained by the guardian before he enters into any compromise on behalf of his ward, *Kalavati v. Cheddilal* (I. L. R. 27 All. 531) and the leave should be express and is not to be inferred from the passing of the decree, *Sharat Chunder Ghosh v. Kartik Chunder Mitter* (I. L. R. 9 Cal. 810), *Monohur Lal v. Jadunath Singh* (10 C. W. N. 898). In the case of *Aman Singh v. Narain Singh* (see Trevelyan on Minors, 3rd Ed., p. 319; I. L. R. 20 All. 98), however, where the Court sanctioned the compromise after it had been entered into and where there was no fraud and the compromise was not disadvantageous to the minor, the Allahabad High Court did not set aside the decree.

.....*duty of parties and of Court*.—It is the duty of the parties to place all possible materials before the Court, *Solomon v. Abdool Azeez* (I. L. R. 6 Cal. p. 688) and the Court must endeavour to obtain from the parties all possible information as to the rights of the parties, before it sanctions any compromise, and must not sanction it unless it is satisfied that it is for the benefit of the minor. Where

the facts have not been ascertained in the proceedings, the Court should satisfy itself by evidence, and should use its best endeavours to test such evidence as may be produced (see Trevelyan on Minors, 3rd Ed., pp. 318, 319; *Solomon v. Abdool Azeez*, I. L. R. 6 Cal. 687).

*Power of Hindu widow to compromise*.—A Hindu widow as owner of an estate in litigation, has the same control with respect to compromises as she has with respect to the assertion of her rights, and with respect to appeal against an adverse decision. But a compromise by which a Hindu widow gives up all her rights in her husband's estate, receiving only a life-interest in a part of it, cannot but be regarded as an alienation, and is not binding against the reversioners (14 W. R. 146). Hindu widows have no power, by a compromise between themselves, to affect the rights of the successor to the estate, on their death (I. L. R. 25 Cal. 89; s. c. 1 C. W. N. 697).

*Authority of Counsel to compromise*.—The conduct and control of a case in which counsel is engaged are necessarily left to him, who has complete authority over the case itself, though not as to collateral matters. Counsel has general authority over the case, which may be limited by the client, and if the other side is informed that it has been limited, an act in excess of the limit does not bind the client (see Chitty on Contracts, 14th Ed., p. 488; see also, Roscoe on *Nisi Prius*, 18th Ed., 283). The same principle has also been laid down in the Indian cases. Thus in the case of *Rai Nundo Lal Bose v. Nistarini Dasi* (4 C. W. N. 169), the Calcutta High Court laid down as follows:—"Counsel possesses a general authority—an apparent authority—which must be taken to continue until notice be given to the other side by the client that it has been determined, to settle and compromise the suit in which he is actually retained as counsel and in the exercise of his discretion, to do that which he considers best for the interest of his client in the conduct of the particular case in which he is so retained. Where, however, the compromise extends to collateral matters outside the scope of the particular case in which he is retained as counsel, it must be shown, in order to bind his client, that he has from his client special authority to compromise upon the terms upon which the compromise is effected, and the other side cannot avail themselves of the position that they do not know that it has not been given. Where a counsel honestly believes that he has special authority to compromise the suit in which he is retained as well as matters outside the scope of that suit, but as a matter of fact he has no such authority, he cannot bind his client. Likewise, in the case of *Jang Bahadur Singh v. Sunkar Rai* (see Chitty on Contracts, 14th Ed., p. 488; also Roscoe on *Nisi Prius* Evidence, 18th Edition, p. 283), the Full Bench of

the Allahabad High Court laid down as follows:—  
 "A counsel, unless his authority to act for his client is revoked and such revocation is notified to the opposite side, has, by virtue of his retainer, and without need of further authority, full power to compromise a case on behalf of his client, and the Court will not disturb a compromise so entered into, unless it appears that it was entered into under a mistake and that some palpable injustice has been thereby caused to the client." But it is not competent to a pleader to enter into a compromise on behalf of his client without his express authority to do so, *Jagapati v. Ekambara* (I. L. R. 21 Mad. 274; see also I. L. R. 34 Cal. 83).

### EXECUTION-SALES AND RIGHTS OF UNRECORDED TENANTS.

In the Full Bench case of *Sham Chand v. Brojonath*, 21 W. R. 94; s. c. 12 B. L. R. 484, it was laid down by Couch, C. J. (the other Judges concurring) upon a consideration of the provisions of secs. 105 and 106 of Act X of 1859 that a "zemindar having obtained a decree for arrears of rent is entitled to sell the tenure; and that the person who has obtained a transfer which he has not registered, and cannot show a sufficient cause for not registering it, is bound by the sale, and cannot set up a title which he has acquired by a previous sale." His main ground for holding this was that "by 'tenure' is meant not the right or interest of any person in the land, but the holding or the interest which has been created by the lease." The provisions of secs. 105 and 106 of Act X of 1859 have undergone some modification in later enactments, Act VIII B. C. of 1869 and Act VIII of 1885. The latter by sec. 65 makes the rent a first charge on the holding or tenure, and whilst providing by the same section that the tenure or holding shall be liable to sale in execution of a rent decree, clearly lays down in sec. 159 and the following sections that such a sale does not *ipso facto* pass the whole holding or tenure. For the protection of unrecorded co-sharers and other persons interested in the tenure (when it is a tenure and not a raiyati holding) Act VIII of 1885 further provides what does not appear to be very effective means to secure the registration of the heirs of a deceased tenure-holder or transferees of the whole or a portion of the tenure in the landlord's *sherista*. (Vide secs. 11 to 17.) But no similar provisions have been made in Act VIII of 1885 for the registration in the landlord's *sherista* of the names of the heirs of raiyats or transferees of raiyati holdings, where such holdings are transferable by custom.

What the precise effect of the modifications introduced in the later statutes may be on the binding character of the decision above referred to has not been fully gone into in any of the

reported decisions. Secs. 11 to 17 of the Bengal Tenancy Act may be interpreted as casting upon heirs and transferees of tenure-holders the duty of procuring their recognition by the landlord by the registration of their names in the landlord's *sherista*. But whether these provisions entirely relieve the landlord of the duty of finding out and impleading in his suit all the heirs of a deceased tenant when he wishes to sue for arrears of rent due on the tenure, is not clear. The rule, however, has been held to be applicable to the case of sales of raiyati holdings in at least two recent cases, *Ashok v. Karim*, 9 C. W. N. 843 and *Ananda Kumar v. Haridas*, 4 C. W. N. 608; s. c. 27 Cal. 545, on the ground that the landlord is bound to recognise the heirs of an occupancy raiyat. From the above, it seems reasonably clear that the rule that sales in execution of decrees for rent against the registered tenants pass the entire tenure and not merely the right, title and interest of the judgment-debtor has had its origin in certain peculiarities of the rent law of the province, one of such peculiarities being the supposed duty of the heirs or transferees of tenants to obtain recognition by the landlord by applying for registration of their names in the *sherista* of the landlord. It is also undoubted that in its inception the rule was applied only to sales of tenures or holdings in execution of a "rent decree" properly so called, that is to say a decree obtained by the sole landlord or the entire body of co-sharer landlords.

In the case of *Jeo Lal v. Gunga Pershad*, I. L. R. 10 Cal. 996, the rule was extended to apply to a sale in execution of a decree for rent obtained by a co-sharer landlord, which necessarily was a sale under the Civil Procedure Code. The ground was stated by Sir Richard Garth, C. J., to be "that the judgment-debtor had been sued as representing the ownership of the whole tenure, and that the sale though purporting to be of the right and interest of the judgment-debtor only, was intended to be, and in justice and equity ought to operate as a sale of this tenure." The reasons here given are quite independent of any special provisions of the law of landlord and tenant. Garth, C. J., appears in fact to have applied to this case by analogy the rule of Hindu law by which sales in execution of decrees obtained against the managing member of a joint Mitakshara family have been held to pass the interest of all the coparceners. In *Nitaye Behari v. Hari Govinda*, I. L. R. 26 Cal. 677, Hill, J., stated this rule in these words: "Given the community of interest and the necessary representation and that is all that is required. These principles do not appear to me to be peculiar to the Hindu Law or to be restricted in their application to cases in which one has to do with a joint undivided Hindu family." In *Rajani Kant v. Usir Bibi*, 7 C. W. N. 171, the unrecorded tenants were held to have acquiesced in



the representation of the holding by the tenant who executed the *kabuliyat*.

If the rule is to be founded on the ground of representation by one tenant of the interest of the whole body of tenants, it is apparent that its operation cannot be restricted to the case of a rent decree obtained by the sole landlord or the whole body of landlords. Nor can its operation be limited only to cases where the procedure laid down for rent sales has been followed. In *Nitye Bihari's* case as in *Feo Lal's* the sale took place under the procedure laid down in the Civil Procedure Code.

In *Rupram v. Iswar*, 6 C. W. N. 302, however, Ghose and Brett, JJ., declined to apply the rule in *Feo Lal's* case to a sale upon a certificate under the Public Demands Recovery Act issued against the recorded tenant alone. In *Afraz Molla v. Kulsummanessa*, 10 C. W. N. 176, Rampini, J., was of opinion that "some doubt has been thrown on *Nitye Behari's* case by the decisions in *Rupram v. Iswar* and *Manuattan v. Harinath*, 1 C. L. J. 500, and the correct rule of law as to what passes at a sale held in execution of a rent decree obtained by a co-sharer landlord has been laid down by the Privy Council in *Jiban v. Brojo*, 7 C. W. N. 425; s. c. L. R. 30, I. A. 81." Mookerjee, J., in the same case tried to reconcile the conflict indicated in the judgment of Rampini, J., by endeavouring to show that they all proceeded upon the common ground of representation and estoppel. Whether there has been a sufficient representation in any particular case is in this view a question of fact to be decided upon the evidence in the case.

If this be the correct view of the law then in no case should the interest of unrecorded tenants be held to pass by a sale, whether under the rent law or under the Civil Procedure Code, (as it is frequently assumed it does) merely because the decree had been obtained against the recorded tenant. In each case a definite issue on the question of estoppel or representation should be raised by the party claiming the entire holding or tenure under his purchase, and a decision must be recorded in his favour, before the unrecorded owners are deprived of their property. In this connection the observations of the Judicial Committee in *Prosonno Coomar v. Golah Chand*, L. R. 2 I. A. 145, on the analogous case of the sale of *debutter* property in execution of a decree obtained against a *shebait* would seem to be instructive.

It will have been seen from the above that the rule that a decree for rent against a recorded tenant binds the tenure is traceable to two distinct principles, one derivable from the supposed peculiarities of the law of landlord and tenant of these provinces, and the other founded on the principle of representation and estoppel. If the two principles are kept distinct in their application to the

different classes of cases to which they apply, no serious or widespread mischief may be caused. But the consequences are very serious when, as is not unfrequently done, it is assumed as a matter of law that the recorded tenant represents the tenure in all the tenants' dealings with the landlord. (For illustration, see passage at p. 669 in I. L. R. 26 Cal.). Whether he does so or not is a question of fact to be decided upon the evidence in each case. It is not true to say that in these provinces the fact of some or one only of the co-sharers in a tenure or holding being registered in the landlord's *sherista* is due universally or in even a majority of cases to an understanding amongst the raiyats that these or he should represent the others in their dealings with the landlord. It is also doubtful whether any satisfactory procedure exists to enable a tenant to compel the landlord to register his name in his books. In this view we think, the reasons given in the judgment of Wilson and O'Kinealy, JJ., which we reported in the last number (*Doorgadhur Biswas v. Haro Mohinee*, 13 C. W. N. 270), for declining to lay down such a rule of law are sound and ought to be widely followed in order to check an undue extension of the principle laid down in *Feo Lal's* case.

#### CURRENT INDIAN CASES.

IN THE MATTER OF HIRALAL NAVALRAM, I. L. R. 32 Bom. 505. *Stamp Act, Sch. I, Art. 23—Conveyance.*

By a certain document the executing party purporting to be entitled to a four annas share in a going pressing factory, transferred the whole of that share to the other person interested in the factory for the sum of Rs. 17,841; the terms of the transfer were that "in consideration for all his rights he has received Rs. 17,841, and nothing remains due to him in respect of the aforesaid things."

Held, that the document was a conveyance on sale of property.

GANPAT v. SUPDU, I. L. R. 32 Bom. 509. *Partition deed—Stamp Act, sec. 2, cl. (15).*

Where four lists of the family property were made by four undivided brothers, and on each three brothers signed and there was an endorsement acknowledging receipt of the property, and the property mentioned in the list was assigned to the share of the brother who had not signed on it, and it was contended that the lists were not an instrument of partition but an acknowledgment by all the brothers of the fact of past partition.

Held, that the four documents when read together constituted an instrument of partition within the meaning of sec. 2, cl. (15) of the Stamp Act.

**KALLIANJI v. BEZANJI, I. L. R. 32 Bom. 512.**  
*Attesting witness whether bound by contents of document.*

Where a son was aware of the contents of a deed of gift made by his father in favour of the grandson describing the property as self-acquired;

*Held*, that the son was bound by the contents of the document that the property was self-acquired.

## Notes of Cases.

### CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

**CIVIL APPELLATE JURISDICTION.** Before CASPERSZ and DOSS, JJ. • **APPEAL FROM ORIGINAL ORDER No. 307 of 1907. SUNDAR DAS KHETRY AND ANOTHER, Opposite Party, Appellants v. SARODA CHARAN ASH AND ANOTHER, Petitioners, Respondents.** 17th December 1908.

*Civil Procedure Code (Act XIV of 1882), sec. 624* —“Made.”

On the 7th June 1905 Babu Aghore Chunder Hazra, Subordinate Judge, made a decree purporting to be against the Defendants, other than Defendants Nos. 8 to 9, for rent and royalty in respect of a lease of a colliery granted by the Plaintiffs to Defendant No. 1 and directed the costs to be recovered from the Defendants Nos. 1 to 6 including the present Respondents who were the Defendants Nos. 4 and 5. The decree further declared that certain mortgages and other deeds executed by Defendant No. 1 in favour of the other Defendants were collusive documents void as against the Plaintiffs. The Plaintiffs applied for execution of their decree on the 27th June 1905; the Defendants Nos. 1 to 6 were made liable, certain properties belonging Defendant No. 1 were attached, on the 4th August, and they were sold. Then the decree was transferred for execution to the High Court in the exercise of its Original Jurisdiction in June 1906. On the 6th July 1906, the Defendants Nos. 2 to 6 applied for amendment of the decree under sec. 206, C. P. C. That amendment was allowed by the same Subordinate Judge, but on application to the High Court that order was set aside on the 19th February 1907. The question was whether the decree was not virtually one against the Defendant No. 1 only. The High Court held that the question did not come within the scope of sec. 206, C. P. C., but indicated that it was a case in which the only remedy open to the Petitioners was by an application under sec. 623, C. P. C., for a review of judgment.

Then the Respondents applied for review to the Court of the Additional Subordinate Judge on the 13th March 1907 and on the following day they moved the District Judge for a transfer of their application from that Court to the Court of the permanent Subordinate Judge, over which Babu Aghore Chunder Hazra was then presiding. In the meanwhile, on the 13th March 1907, the Subordinate Judge had ordered notice to be issued on the opposite party. The transfer from his file was not made until the 6th May 1907, whereupon Babu Aghore Chunder proceeded to decide the application and granted a review. He proceeded on the supposition that it was a case falling within sec. 624, C. P. C. He said that his judgment and decree were faulty owing to clerical errors having crept in and some persons who ought not to have been made liable for the claim, had been made liable through mistake. He, therefore, thought that it was competent to him to entertain the application, although it was not presented to him in the first instance; that, further there was sufficient cause for the Petitioners not applying for review within the period of limitation allowed by law; on the merits it was held that the Petitioners were not liable for the principal claim of the Plaintiff, nor was it intended that they should be made liable.

*Held*—That as there was no clerical error in the decree sec. 624 applied. The word “made” in sec. 624 of the Code means “presented.” But though the application for review was presented to another officer it was made to the same Court which passed the decree, and the mind of the same officer who delivered the judgment sought to be reviewed proceeded to review it. That in the circumstances, the requirements of sec. 624, C. P. C., were substantially complied with and that Babu Aghore Chunder Hazra was competent to hear and determine the application for review.

*Held*—However, that the application was made long after the period of limitation for such an application had expired and no sufficient cause had been made out for not making it earlier.

*Dr. Rash Behary Ghose and Babu Joges Chunder Dey* for the Appellants.

*Mr. Dunne and Babus Mohendra Nath Roy and Nogendra Nath Ghose* for the Respondents.

A. T. M.

*Appeal allowed.*

**CIVIL APPELLATE JURISDICTION.** Before DOSS and RICHARDSON, JJ. **CIVIL RULE No. 2786 of 1908. SHAMA CHARAN DASS, Petitioner v. DURGA PROSAD PAL, Opposite Party.** 18th January 1909.

*Execution sale, set aside—Decree satisfied pending appeal by auction-purchaser—Effect.*

Landlord obtained a decree for arrears of rent and in execution of that decree the holding was sold on the 5th July 1907 and purchased by Durga



**Prosad, the Opposite Party.** The Petitioner alleging himself to be a mortgagee of the holding applied for setting aside the sale under sec. 317, C. P. C. The Munsif held that the sale was bad on account of certain irregularity and set it aside on the 27th January 1908. The auction purchaser appealed to the District Judge against the order setting aside the sale and the District Judge by his order, dated the 6th June 1908, reversed the decision of the Munsif and confirmed the sale. In the meantime after the decision of the Munsif, dated the 22nd January 1908, the decree-holder having prayed for a fresh proclamation the same was issued on the 14th of April 1908, the Petitioner deposited the decretal amount and the decree-holder withdrew the same. The Petitioner moved the High Court and obtained the present rule on the ground that at the time when judgment of the District Judge was passed there was no existing decree which had been satisfied by the payment of the 14th April and therefore the order confirming the sale was void.

**Held**—The order dated 20-1-08 setting aside sale was not final as there was an appeal to District Judge and the Petitioner had no right to deposit the money and to satisfy the debt pending the appeal and the Munsif had no jurisdiction to enter such satisfaction.

**Babu Hari Bhushan Mookerjee** for the Petitioner.

**Babu Kshetra Mohun Sen** (for **Babu Atulya Chakran Bose**) for the Opposite Party.

A. T. M. *Rule discharged with costs.*

## APPELLATE JURISDICTION ACT, 1908.

8 EDW. 7, CH. 51.

*An Act to amend the Law with respect to the Judicial Committee of the Privy Council and the Court of Appeal in England.*

Be it enacted by the Kings most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) For the purpose of the hearing of any appeal to His Majesty in Council from any court in a British Possession, His Majesty may, if he thinks fit, authorise any person who is or has been a Judge of the court from which the appeal is made, or a Judge of a Court to which an appeal lies from the Court from which the appeal is made, and whose services are for the time being available, to attend as an assessor of the Judicial Committee of the Privy Council on the hearing of the appeal.

(2) This section shall not apply to any British Possession except the possessions specified in the schedule to this Act and any possession which may hereafter be added to that schedule by Order in Council.

2.—(1) If any person being or having been Chief Justice or Judge of any High Court in British India is a member of His Majesty's Privy Council, he shall, if His Majesty

so directs, be a member of the Judicial Committee of the Privy Council.

(2) The number of persons being members of the Judicial Committee by reason of this section shall not exceed two at any one time.

(3) In this section the expression "High Court in British India" means the High Court of Bengal, Madras, Bombay, or the North-Western Provinces, or any other Court in British India which may for the time being be recognised for the purpose by Order in Council.

3.—(1) Section one of the Judicial Committee Amendment Act, 1896, shall have effect as if the persons named therein included any person being or having been Chief Justice or a Justice of the High Court of Australia or Chief Justice or Judge of the Supreme Court of Newfoundland.

(2) The schedule to the Judicial Committee Amendment Act, 1895, shall be read as if the Transvaal and the Orange River Colony were included therein as South African Colonies.

4. Any member of the Judicial Committee of the Privy Council may resign his office as member of that Committee by giving notice of "his resignation in writing to the Lord President of the Council.

5. His Majesty may from time to time by Order in Council make a general Order directing that all appeals shall be referred to the Judicial Committee of the Privy Council until the Order is rescinded, and sec. 9 of the Judicial Committee Act, 1844, shall have effect as if any such general

Order for the time being in force were substituted in the first proviso to that section for the annual Order therein referred to, and the time for which the Order remains in force were substituted for the twelve months next after the making of the general Order. The expression "appeals" in this section means appeals on petitions presented to His Majesty in Council, and includes any complaints in the nature of appeals and any petitions in the matter of appeals.

6.—(1) The Lord Chancellor may request the attendance at any time of any Judge of the High Court to sit as an additional Judge at the sittings of the Court of Appeal and any Judge whose attendance is so requested shall attend accordingly.

(2) Every Judge who attends in pursuance of this section shall be deemed to be an additional Judge within the meaning of sec. 1 of the Supreme Court of Judicature Act, 1875, and sec. 19 of the Appellate Jurisdiction Act, 1906 (which relate to the constitution of the Court of Appeal).

(3) The fifth paragraph of section four of the Supreme Court of Judicature Act, 1875, beginning with the words "The Lord Chancellor" and ending with the words "attend accordingly," is hereby repealed.

7.—(1) This Act may be cited as the Appellate Jurisdiction Act, 1908.

Short title and construction.

(2) The provisions of this Act shall be in addition to and shall not affect any other enactment for the appointment of or relating to members of the Judicial Committee.

SCHEDULE.

British India.  
The Dominion of Canada.  
The Commonwealth of Australia.  
The Dominion of New Zealand.  
Cape of Good Hope.  
Natal.  
Transvaal.  
Orange River Colony.  
Newfoundland.

# THE Calcutta Weekly Notes.

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### REPORTS (See Index.)

WE ARE GLAD THAT SIR LAWRENCE JENKINS will succeed Sir Francis Maclean as Chief Justice of the Calcutta High Court on his Lordship's retirement on the 31st March. When Mr. Justice Jenkins was about to leave Calcutta to take up the position of the Chief Justice in the Bombay High Court we expressed a hope that he might return to the High Court of Calcutta in a similar capacity (C. W. N. cxlv). We congratulate ourselves and the ex-Chief Justice of Bombay that the general hope in this respect has now been fulfilled.

THE NEW CIVIL PROCEDURE CODE (Act V of 1908) was extended to the Districts of Darjeeling, Hazaribagh, Ranchi, Palamau and Manbhum by a notification dated the 5th January 1909 published in the *Calcutta Gazette* of 6th January last. By some oversight the provisions of the Provincial Insolvency Act (III of 1907) without which a judgment-debtor who has been arrested in execution of a decree cannot move to have himself declared an insolvent [See sec. 55, cl. (3) of Act V of 1908] were not extended to those districts till about the end of January last, vide notification dated 25th January 1909 published in the *Calcutta Gazette* of 17th January 1909 as to the District of Darjeeling, and notification dated 30th January 1909 published in the *Calcutta Gazette* of 3rd February 1909 as to the Chota Nagpur Districts. Owing to the time intervening between the extension of these two Acts in the above areas there was just apprehension in the minds of people in those

parts that judgment-debtors under arrest who formerly could avail themselves of the provisions of the old Civil Procedure Code to obtain their discharge have been deprived of that remedy with the introduction of the new Act. But the publication of the above notifications will, we are sure, now remove any such misapprehension.

THE RECENTLY PUBLISHED SUMMARY OF ENGLISH civil judicial statistics for 1907 shows a decline in the appeals to the Judicial Committee of the Privy Council during the year. The following extract which compares the figures of the two highest Courts of Appeal in the empire is interesting:—

With regard to the Judicial Committee of the Privy Council, there was a substantial decrease in appeals entered from 1906, for in 1907 but seventy-five were entered, as against ninety-nine in the preceding year, this last figure being the largest since 1903, when the maximum number ever recorded—viz. 113—was entered. Seventy-eight appeals were determined after a hearing as against eighty-nine in the preceding year, and, of those 80 heard, in forty-three cases the judgment below was affirmed, in thirty-two reversed, and in three varied. This tribunal sat on seventy-four days, as compared with eighty-seven in 1906, and the figures available show that the average costs per case brought in amounted to £306, and the average amount allowed £449. Turning to the House of Lords, ninety-three petitions of appeal were presented, as compared with fifty-three in 1906, this figure being the smallest since 1891. During 1907 the House sat for judicial business on 110 days, being forty more than in 1906, and finally adjudicated upon seventy-three appeals, as compared with forty-five in the preceding year. Of these seventy-three cases, in forty-eight the judgment below was affirmed and in twenty-five reversed, it being interesting to note that out of fifty-five appeals from the Court of Appeal in England twenty-two orders were reversed, while out of fifteen appeals from the Court of Session in only two was the appeal allowed. So far as the costs of appeals to the House of Lords are concerned, the average is nearly double those in the Privy Council, for the average amount brought in was £689, and the average amount allowed £441.

A LARGE AND INFLUENTIAL MEETING WAS HELD in the council-room of the Law Society on Tuesday the 15th of December last to consider the advisability of forming a society to further the cause of legal education and to discuss matters affecting the work and interests of public teachers of law in England and Wales. The meeting was presided over by Prof. Goudy, the Regius Professor of Civil Law at Oxford, and was attended by distinguished

professors and readers of law from the Oxford, Cambridge, Manchester and the London Universities and the lecturers of the Council of Legal Education and the teaching staff of the Law Society. It was stated at the meeting that there are considerably over 100 public teachers and not fewer than 2,000 students giving and receiving instruction in law in England and Wales at the present moment. The meeting decided that the Society should take into account not only the older institutions imparting legal education but also the newer universities founded in the great provincial towns and the municipal machinery that had been enlisted in support of providing facilities for legal education as also the local professional bodies. The speakers dwelt on the advantages to be derived from occasional personal intercourse between men engaged in common work under very diverse conditions at widely scattered centres. It is said that the society may be instrumental in developing a legal University in London. The proper function of a University is to co-ordinate the different existing educational agencies and help on the work undertaken by each of them and supplement such work by providing facilities by the establishment of chairs, libraries or other institutions where students already familiar with legal principles may prosecute further studies in comparative jurisprudence.

MOST OF THE OLDER UNIVERSITIES IN EUROPE had their origin in the association of teachers and it seems likely that the Universities of the future would also draw all their ennobling inspirations from similar sources. Regarding the usefulness of the recently formed society our leading English legal contemporary says :—

An association which, if it is carried on in the spirit in which it has been conceived, may exercise a beneficent influence upon the course of legal education was founded at the Law Society's Hall on Tuesday afternoon, when a number of the foremost teachers of law, including Professor Goudy, Professor Dicey, Professor Holland, Professor Kenny, Professor Clark, Sir John Macdonell, Mr. Blake Odgers, K. C., and Mr. Edward Jenks assisted in the formation of 'The Society of Public Teachers of Law in England and Wales.' It is well that men engaged in a common calling should have facilities for social intercourse and exchange of views, but it is obvious that an association including among its numbers all the chief educational experts in the legal world can easily extend its scope beyond the narrow limits of a professional body. A better organisation of the various educational authorities, the relation of academic to professional teaching, more scientific methods of instruction, the proper contents and sequence of legal curricula—these are some of the important subjects to which the newly formed association may usefully devote its attention, for its treatment of them may eventually help to secure the establishment of that great School of Law which all earnest critics of our system of legal education have long desired to bring about.

The following extract from the same source which traces the origin of the English Universities

and accounts for the degeneration of the Inns of Court will also be found interesting :—

We noted last week the formation of a Society of Teachers of Law, which has in it the possibilities of a great movement. The Universities of Oxford and Cambridge were originally nothing more than associations of teachers and lecturers gathered together at those places for the teaching of philosophy, theology, and the civil law. It may be that from this association there will spring in time that School of Law which many have dreamt of and some have planned, but which has hitherto lacked a starting-point among the actual teachers of the law. London, indeed, which may be regarded as the fountain-head of English law, had in the Middle Ages its legal University; for it is related by Stowe and by Coke that the Inns of Court and the Inns of Chancery, which were grouped about the outskirts of the City, formed together 'the University, the most famous in all Europe for legal studies.' It was during the seventeenth and eighteenth centuries that London lost that proud pre-eminence, when the Inns of Chancery decayed into the lodging-houses of attorneys and the Inns of Court became the dining clubs of Benchers and students. The University as a place of legal learning was broken up, and the scientific study of the law found a new home at Oxford and Cambridge, which had hitherto neglected it. The last century saw the revival of all professional education, and, following the lead set by the solicitors, barristers once more made the Inns legal colleges, or at least took some steps towards carrying out the educational trusts upon which they were founded. But the decay of 200 years could not be repaired in fifty, and legal studies can no longer be concentrated in the capital. Moreover, the growth of democracy has created a demand for decentralised legal training; the new Universities in the provinces as well as the ancient seats of learning have their schools of law; not only professional bodies but municipalities have been compelled to provide legal lectures in every large centre. It is eminently desirable that there should be some common understanding between the men engaged in these different kinds of legal education, so that overlapping may be prevented, the co-ordination of professional education insured, and the best educational methods standardised. It will be one of the functions of the new society to see to this, and it is a happy omen for its work in this direction that its three officers are professors respectively at the Universities of Oxford, Cambridge and the school of the Law Society. But the higher function which we hope of the Society is to lay the foundation of a new legal University. For, if legal education can no longer be concentrated at London, it is worthy and fitting that it should have a great central school there where the higher scientific knowledge of the law should be imparted to those who have studied various branches of it elsewhere. The Imperial School of Law which Chancellors and Chief Justices have failed to found may yet be brought into being by the Professors and Readers.

## THE LAW RELATING TO COMPROMISE.

### IV. SOME SPECIAL RULES AFFECTING PROCEDURE.

*How far compromises in suits are exempted from registration.*—A compromise does not require registration only in regard to such of its stipulations and provisions as are incorporated with and given effect to by the order of the Judge. The provisions of the Registration Act will apply only to terms in the compromise which are not so incorporated. (See *Pranal v. Lakshmi*, I. L. R. 22 Mad. 508 (P. C.) and *Patha v. Esup*, I. L. R. 29 Mad. 365). In the case of *Govinda Chandra Paul v.*

*Dwarkanath Paul* (12 C. W. N. 849; see I. L. R. 86 All. 78; I. L. R. 29 Mad. 365; 2 C. W. N. 663; I. L. R. 30 Mad. 473), where in a suit for recovery of money due on *bahi khata* accounts, a decree was made upon a petition of compromise for the payment by the Defendant of a certain sum by instalments, and the decree further declared that certain immoveable properties specified in the petition of compromise, should be hypothecated for the realisation of the money, and that the Defendant would not be able to create any incumbrance on the same, it was held by the Calcutta High Court that, having regard to cl. (1) of sec. 17 of the Registration Act, the latter clause even if it amounted to a mortgage, would not require registration. In the case of *Purna v. Panchkari*, (10 C. W. N. clxxii; s. c. 5 C. L. J. 15), Rampini, J., however, observed as follows:—"Hence it is clear that any thing which forms part of the compromise but which is not part of the subject-matter of the suit, cannot be regarded as finally settled between the parties..... The deed of compromise and the *solenama* were not registered, and although embodied in the decree, that had not the effect of doing away with the necessity of the registration which is required by cl. (a) of sec. 48 of the Bengal Tenancy Act." A contrary rule of law seems to have been laid down in the case of *Fasimuddin v. Bhuvan Felim* (I. L. R. 34 Cal. 456). There the Plaintiffs sued the Defendants for damages for wrongfully taking fish from a *jalkar* and a *solenama* was filed in the suit in 1893 by which the Plaintiffs agreed to take a smaller sum than the amount claimed as damages and the Defendants agreed to take a permanent lease of the *jalkar* from the Plaintiffs at a yearly rent of Rs. 413, and it was further provided that so long as the contract was not completed, the Defendants would be at liberty to use the *jalkar* and would pay rent from the year 1300, B. S. A decree was made on the basis of the compromise. Their Lordships held that although the terms of the *solenama* regarding the taking of the lease could not have been enforced in the execution of the decree, they must be held to be binding on the Defendants as an agreement; that no objection could be taken as to the admissibility of the *solenama* on the ground of its being unregistered; that the Defendants having been in occupation of the *jalkar* after 1893, was bound to pay rent to the Plaintiffs under the terms of the *solenama*. But in the case of *Birajmohini Dassi v. Kedar Nath Karmakar* (12 C. W. N. 854), where the Plaintiff sued a tenant for increased rent on the basis of a petition of a compromise filed in a criminal proceeding, which resulted in the withdrawal of the proceeding, though no order was passed incorporating the terms of the petition, it was held by the Calcutta High Court that the petition was not admissible in evidence without

registration. If, however, the petition had been filed in a civil proceeding, and had been followed by an order or decree, which embodied directly or indirectly its terms, then it would not have been necessary to have had it registered. Lastly, in *Pitambar Gain v. Udhav Mondal* (12 C. W. N. 59; see *Kali Charan Ghosal v. Ram Chandra Mandal* (I. L. R. 30 Cal. 783) and *Birbadra Rati v. Kalpataru Panda*, 1 C. L. J. 388), where a petition of compromise merely contained a recital of a previous oral agreement for lease, it was held that it did not require registration stamp. It was evidence of an oral agreement but not an agreement in itself.

*Compromise pendente lite*.—Sec. 375 of the Code of Civil Procedure, Act XIV of 1882, corresponding to Order 23, Rule 3 of Act V of 1908, which runs thus: "Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the Defendant satisfies the Plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass decree in accordance therewith, so far as it relates to the suit," provides for compromises entered into by the parties in the course of judicial proceedings. Now we have to consider two things here:—(1) whether any such compromise becomes *ipso facto* binding upon the parties before the Court passes a decree on the terms of the compromise and according to the provisions of the above section, so as not to allow any party to it to resile from it at the last moment; or (2) whether the above section is only applicable to cases where the parties at the time of moving the Court, agree to have the terms entered into carried out, and judgment entered up. See Caspersz on Estoppel, (Tagore Law Lectures, 1893, 2nd Ed., p. 252 *et seq.*).

The former view seems to have been taken by the Bombay and Madras High Courts and latterly by the Calcutta High Court. Thus in the case of *Ruttonsey Lahi v. Pooribai* (I. L. R. 7 Bom. 304; see also *Goculdas Buladas Manufacturing Co. v. James Scott*, I. L. R. 16 Bom. 202), Scott, J., of the Bombay High Court observed that the Legislature framed sec. 375 with a view to enforce agreements unconditionally made, even though one of the parties desires to withdraw his consent. So in the case of *Appasami v. Manikam* (I. L. R. 9 Mad. 103; *Karrubpan v. Ramasami*, I. L. R. 8 Mad. 482 and *Ruttonsey Lahi v. Pooribai*, I. L. R. 7 Bom. 304, followed), where the parties to an appeal in which an issue had been remitted for trial to the lower Court, having presented a petition to the same Court stating that the suit had been compromised and the terms of the compromise, requested it to move the Appellate Court to pass a decree in accordance with such terms,

and before a decree was passed, one of the parties objected to the compromise being accepted by the Court, the Madras High Court held that it was open to the Court, notwithstanding such objection, to pass a decree in accordance with the agreement. The same view was taken by their Lordships of the Calcutta High Court in the Full Bench case of *Bijodurlabh v. Ramanath* (I. L. R. 24 Cal. 908; s. c. 1 C. W. N. 597 (F. B.) dissenting from the ruling in *Hara Sundari Devi v. Kumar Dakhinessu Maica*, I. L. R. 11 Cal. 250), where it was held that sec. 375 does not apply where a party is unwilling to have judgment entered up.

**Compromise pending appeal.**—A compromise may be entered into during the pendency of an appeal. In the case of *Radha Kant Doss v. Ayesli Ali* (8 W. R. 109; see *Dwarkanath Sarmah v. Ganoda Sundari*, 5 W. R. Mis. 30) where a *sole-nama* was based on the condition that the Defendant should at once withdraw his appeal, but instead of doing so, he went on with the appeal and caused notice to be served upon the Plaintiff, and the latter actually appeared, and the appeal would have come on for hearing, but for the accidental absence of the Defendant's pleader on the day of hearing it was held that the Defendant had by his own act put an end to the adjustment of the case between himself and the Plaintiff.

**Compromise extending beyond subject-matter of suit.**—A compromise is not necessarily invalid simply because it goes beyond the subject-matter of the suit and contains other conditions. The other conditions, if they are the consideration for the compromise of the subject-matter of the suit, must be incorporated in the decree; but if the other conditions are independent of it, they may be regarded as surplusage (*Purna Chandra Sarkar v. Nil Madhub Nandi*, 5 C. W. N. 485). In the case of *Jasammuddin Biswas v. Bhuban Jelani* (I. L. R. 34 Cal. 456) already cited, a similar view seems to have been expressed by the High Court in Calcutta. "At the same time," observed Mr. Justice Brett (I. L. R. 34 Cal. 463), "we are of opinion that as the *solennama* embodied the agreement entered into by the two parties, on the basis of which both parties entered into the compromise in that case, and as the agreement on the Defendant's side to take the permanent lease at the rental fixed, must be taken to have formed one of the grounds or reasons which induced the Plaintiff to accept as damages a sum less than he claimed in the suit, the Defendants must be held to be bound by the agreement embodied in the *solennama*." But in the case of *Purna v. Panchkari*, (5 C. L. J. 15 at p. 16), a contrary view appears to have been expressed by Rampini and Harrington, JJ. In that case, A sued B for damages for crops misappropriated. A petition of compromise was put in, by which the amount of damages, was

settled and B agreed to hold the land under A at a specified rent. Their Lordships held that the agreement as to the tenancy was outside the scope of the suit, and although incorporated in the decree did not operate as *res judicata*. "Hence it is clear," observed Rampini, J., "that anything which forms part of the compromise but which is not part of the subject-matter of the suit cannot be regarded as finally settled between the parties." But later on his Lordship did, however, remark that "it may be different in a case where the compromise relating to matters outside the suit formed a part of the consideration of the compromise relating to the subject of the suit." A Court refusing to grant a decree on a compromise going beyond the suit, cannot, however, grant a decree modifying the terms of the compromise, but must leave the parties to proceed with the suit as they may be advised. (*Fajaleh Ali Miah v. Kamaruddin*, I. L. R. 13 Cal. 170).

**Compromise after decree.**—There is no bar to the parties coming to an arrangement, after a decree is passed, adding to or varying a decree [see Caspersz on Estoppel (Tagore Law Lectures, 1893) 2nd Ed., p. 255 *et seq.*]. According to the Allahabad High Court (*Stowell v. Billings*, I. L. R. 5 All. 350; *Debi Rai v. Gokal Prasad*, I. L. R. 3 All. 585, F. B.; *Ramlakhan Rai v. Bakhtuar Rai*, I. L. R. 6 All. 623), where the parties entered into a compromise adding to or varying a decree *in facie curiæ* for consideration and such compromise is sanctioned by the Court, the new agreement extinguishes the original decree, and is enforceable only by a separate suit. But the Calcutta High Court (*Sheo Golum Lall v. Beni Prasad*, I. L. R. 5 Cal. 27; see also *Thakur Dyal Singh v. Surja Pershad Misser*, I. L. R. 20 Cal. 22; see also *Ramdayal Banerjee v. Ram Hari Pal*, I. L. R. 20 Cal. 32), held that where, after a decree is made, the parties by mutual agreement make certain terms and inform the Court of them and the Court sanctions the arrangement and makes an order in conformity with it, either party, who has had the benefit of the arrangement and order, is not at liberty to resile from the agreement. The question whether such an agreement does or does not violate the rule that a Court cannot add to its decree, becomes, under the circumstances, one which the Court will not enter into; the party who seeks to raise such a question is estopped by his own conduct, and the action of the Court thereupon. In the case of *Gunga v. Murli Dhar* (I. L. R. 4 All. 240; see also *Daibha v. Rama*, 1 Mad. 387), the Allahabad High Court, distinguishing the Full Bench ruling in *Debi Rai v. Gokal Prasad* (I. L. R. 3 All. 585), however, held that where a compromise did not supersede the decree there was no bar to the original decree being enforced.

**Compromise of offences.**—In misdemeanours which involve damages to an injured party for which he

may maintain an action, it is competent for him, notwithstanding they are also of a public nature to compromise or settle his private damage in any way he may think fit (see Chitty on Contracts, 14th Ed., p. 565). But an agreement for suppressing evidence or for stifling or compounding a criminal prosecution or proceeding for a felony or for a misdemeanour of a public nature, *e.g.*, perjury, or the like, is void (see Chitty on Contracts, 14th Ed., p. 565).

The cases in which the compounding of an offence is permissible are mentioned in sec. 345 of the Code of Criminal Procedure (Act V of 1898). A promise given wholly or in part in consideration of the abandonment of proceedings regarding a non-compoundable offence must, according to illustration (h) of sec. 23 of the Contract Act be void, and the promisor is entitled to relief accordingly (see Cunningham and Shephard on the Indian Contract Act, 10th Ed., p. 138).

J. N. C.

(Concluded.)

## CURRENT INDIAN CASES.

DURASAMI *v.* MUTHIAL, I. L. R. 31 Mad. 458. *Guardian and minor—C. P. C. (Act XIV of 1882), sec. 622.*

A guardian may bind a minor for a pre-existing liability.

An error of law does not come under the purview of sec. 622, C. P. C. But where the mistake of law is the effect of an irregular trial the decree of the lower Court was set aside.

KUPPU *v.* THIRUGNANA, I. L. R. 31 Mad. 461. *Evidence Act, sec. 116—Benamidar.*

The real owner and not his *benamidar* in whose favour the tenant executes the lease is to be regarded as the landlord within the meaning of sec. 116 of the Evidence Act.

A *benamidar* has no right to sue for rent unless he has any legal title to sue under the general law.

ARBUTHNOT'S INDUSTRIALS LD. *v.* MUTHU CHETTIAR, I. L. R. 31 Mad. 464. *Assignment—Execution.*

Where the Plaintiff obtained a money decree against X and during the pendency of the suit X sold his business with all its assets and liabilities to Z but no notice was given to the Court, *held* that the decree could not be executed against the assignee.

MAHOMED *v.* MAHOMED, I. L. R. 31 Mad. 467. *Civil Procedure Code (Act XIV of 1882), sec. 258.*

An agreement discharging one of two or more judgment-debtors is an adjustment and requires to be certified under sec. 258, C. P. C.

GOVIND DAS *v.* SABJU, I. L. R. 30 All. 268. *Limitation Act (XV of 1877), sec. 19—Contract Act I of 1872, sec. 25—Barred debt.*

Sec. 19 of the Limitation Act renders it necessary that the acknowledgment must be made before the expiration of the period prescribed for the suit. Under sec. 25, sub-sec. 3 of the Indian Contract Act a promise made in writing and signed by the person to be charged therewith to pay a barred debt is a good consideration, but there must be a distinct promise and not a mere acknowledgment.

SECRETARY OF STATE *v.* BASHARAT, I. L. R. 30 All. 271. *Insufficiently stamped document—Penalty.*

Where a Plaintiff wanted to have admitted in evidence a certain insufficiently stamped document executed in favour of his predecessor, *held* that the Collector in the first instance can recover the penalty from the Plaintiff.

AMIR BEGUM *v.* THE BANK OF UPPER INDIA, I. L. R. 30 All. 273. *C. P. C. (Act XIV of 1882), secs. 293, 306.*

Where upon a sale of a property the purchaser did not make the deposit at once, and there was a re-sale, *held* that the first sale was no sale and the decree-holder cannot claim compensation if the re-sale fetched a lower price.

NAIZ AHMAD *v.* ABDUL HAMID, I. L. R. 30 All. 279. *C. P. C. (Act XIV of 1882), secs. 43 and 473.*

Plaintiff sued for possession of a certain property and mentioned another property in the plaint about which he said he would bring another suit; he withdrew the suit, but did not obtain permission to bring a second suit, *held* that a suit for the latter property was barred by secs. 43 and 473, C. P. C.

SADDU *v.* BEHARI SINGH, I. L. R. 30 All. 283. *Partition—Occupancy tenant.*

Where on a partition of a village the lands comprised in an occupancy holding fell in two *mehals*, *held* that the position of the tenant remained unaffected.



GOBIND PRASAD v. GOMTI, I. L. R. 30 All. 288.  
*Hindu Law—Endowment.*

A Hindu reserved to himself a life estate in the endowed property and gave the property after his death to his daughter for her life and after her death, directed that it should be applied on the temple, that is, for the purposes of the existing endowment; held that the limitation of the property after the life estates is not contrary to the Hindu Law.

ASMA v. AHMAD, I. L. R. 30 All. 290. C. P. C.  
(Act XIV of 1882), secs. 206, 551.

Under sec. 206, C. P. C., a decree can be amended by a Court which dismissed an appeal under sec. 551, C. P. C.

BASTI BEGUM v. BANARASI PRASAD, I. L. R. 30 All. 297. *Transfer of fictitious mortgage.*

Where Plaintiff instituted a suit upon a mortgage but there was a prior mortgage of a portion of the property which was fictitious but the mortgagee transferred it to another who took it *bona fide*, held that although the transfer of the fictitious mortgage was *bona fide* and for valuable consideration, it did not validate the security as against the Plaintiff.

RAM BILAS v. LAL BAHADUR, I. L. R. 30 All. 318.  
*Second appeal—C. P. C. (Act XIV of 1882), sec. 584.*

In second appeal a question as to whether there is a custom, or not is a question of law if the evidence is legally insufficient or the evidence is not legal.

ABDUL KARIM v. MAGBUL-UN-NISSA, I. L. R. 30 All. 315. *Succession Certificate Act—Dower.*

The dower of a Mahomedan wife is a debt within the meaning of the Succession Act.

SAMIN v. PIBAN, I. L. R. 30 All. 319. C. P. C.  
(Act XIV of 1882), secs. 551, 574.

The case of *Rami v. Brojo*, 25 Cal. 97, is dissented from and it is held that the provisions of sec. 574, C. P. C., do not apply in their entirety to the case of an appeal heard under sec. 551, C. P. C.

NANNHI v. BHURI, 30 All. 921. *Onus—Suit under sec. 283, C. P. C. (Act XIV of 1882).*

Where a Plaintiff in a suit under sec. 283, C. P. C., relies upon a document the onus *prima facie* is upon him to establish its genuineness.

SULTAN BEGUM v. DEBI PRASAD, I. L. R. 30 All. 325. *Partition Act (IV of 1893)—Mahomedans.*

The Partition Act (IV of 1893) applies to Mahomedans also and is not restricted to Hindus alone.

## Reviews.

THE UNREPEALED ACTS OF THE GOVERNOR-GENERAL IN COUNCIL. By *Sas. Bhusan Basu, B. L., Vakil, and Debendra Nath Basu, B. L., Pleader. Part I, from 1834-1858, Part II, from 1858 to 1860.* The Universal Press. 27, Ram Krishnapur Ghat Road, Howrah. 1908.

The present reprint of the Acts of the Governor-General in Council promises to be a useful publication. The amendments to the earlier statutes as effected by later Acts are being carried out in the body of those statutes. The foot-notes furnish valuable information and references and serve to show the careful editing to which the work is being subjected.

THE YEARLY SUPREME COURT PRACTICE, 1909. Vols. I and II. Being the Judicature Acts and Rules, 1873 to 1908, and other Statutes and Orders, relating to the Practice of the Supreme Court, with the Appellate Practice of the House of Lords, with practical notes. By *Messrs. Muir Mackenzie, B. A., T. Willes Chitty, S. G. Lushington, M. A., B. C. L., John Charles Fox and R. E. Ross, LL. B.* London. Butterworth & Co., Law Publishers. 1909.

This is the eleventh edition of a valued work of reference. The notes in the present edition have been almost completely re-written and it is justly claimed for it that it will form a complete guide to the present practice in the Supreme Court of England, including the Appellate Practice of the House of Lords. The arrangement of the Judicature Acts in this edition is also new. They are arranged according to their respective dates, each Act being printed separately by itself with cross-references to earlier and later Acts. The notes are given at the foot. They are concise and at the same time exhaustive and up-to-date, obsolete and reversed cases having been rigorously excluded. The Acts and the Rules together with the notes cover a very wide field and we are not surprised to be told that the editors and the contributors have been at work for over two years in bringing out this revised edition of the work. The variety of the materials dealt with precludes us from noticing them in detail in the present review. The recent amendment of the Civil Procedure Code has brought the practice of the Courts here and in England in many respects on a line, and we have no doubt that the work will afford valuable assistance in

many matters to practitioners in this country. An exhaustive in- covering 350 out of a work of nearly 2,700, as furnishes the necessary key to all the variety of complex materials gathered in its pages. It is a pleasure to handle the work of which the get up and arrangement leave nothing to be desired.

### Notes of Cases.

#### ENGLISH LAW COURTS.

**KING'S BENCH DIVISION.**—*Chabman v. Smethurst.* Before CHANNEL, J., without a jury. 4th November 1908. (1909—1 K. B. 73).

*Promissory note—Personal liability.*

The question in this case was whether the promise to pay in a promissory note was a promise of the Defendant or whether it was a promise of the Company of which he was the managing director. The Defendant was the managing director of a Company and the promissory note was as follows :—

"Six months after demand I promise to pay to Mrs. M. Chapman the sum of 300*l.*, for value received together with six per cent. interest per annum.

"J. H. Smethurst's Laundry and Dye Works, Ltd.

"J. H. Smethurst, Managing Director."

*Held*—That the question depends upon the intention of the parties, which intention must be gathered from the terms of the document alone.

That the word "I" is very strong to shew that the promisor was a person in the ordinary sense, an individual, and not the legal person of a Company and that the name of the Company at the end of the note is not to be treated as the signature of the maker of the note.

That an agent putting his name to a mercantile instrument is liable as principal unless the instrument distinctly shews that he signs as agent.

*Mr. Barnard Lailey* for the Plaintiff.

*Mr. Henle* for the Defendant.

Solicitors for Plaintiff : *Messrs. Mackrell & Ward* for J. H. Whitehead and Son, Cambridge.

Solicitors for Defendant : *Messrs. Morten & Cutler.*

*Judgment for the Plaintiff.*

### CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

**CRIMINAL REVISIONAL JURISDICTION.** Before HOLMWOOD and RYVES, JJ. **CRIMINAL REVISION** No. 1303 OF 1908. **RAMTOHAL DUSADH,** Petitioner *v.* **THE KING-EMPEROR.** 18th January 1909

*Appeal—Summary dismissal under sec. 421, Criminal Procedure Code—Illegality.*

The Petitioner was convicted of an offence under sec. 379, I. P. C., and sentenced to 9 months rigorous imprisonment on the 3rd November 1908. He preferred an appeal to the Sessions Judge of Patna on the 5th idem but it was summarily rejected then and there under sec. 421, Cr. P. C., by an order which ran as follows :—"Vakil heard. The appeal is summarily dismissed under sec. 421, C. P. C."

The Petitioner then moved the High Court and obtained the rule on the ground *inter alia* that his pleader having not been fully ready to argue his case on the merits, the summary dismissal of the appeal prejudiced him greatly.

Their Lordships observed :—

"This was a rule calling upon the District Magistrate of Patna to show cause why the order of the Sessions Judge summarily rejecting the appeal in this case should not be set aside on the ground that the vakil who filed it had not a reasonable opportunity of being heard in support of the same inasmuch as he was not prepared to argue on the day the petition was presented.

Now it appears to us and it is in accordance with the experience of both of us in two different Provinces as regards the practice in the moffussil—that appeals which are supported by a pleader are in practice admitted without any hearing except on the question of bail, the only cases which are usually dealt with under sec. 421, being jail appeals.

"Here the very moment that a petition was filed the pleader was called upon to support the appeal on any or all the grounds upon which it was laid. We do not think that this is a reasonable opportunity of being heard. Had it been necessary to call upon the Crown, according to the universal practice the Crown would have had a week's notice, and we think the Appellants should also have the same notice if the Court desires to hear them under sec. 421, before admitting the appeal.

"We therefore make the rule absolute and direct that the pleader should have a further opportunity of being heard after due notice to the Appellants."



Mr. Dunne with Babu Ganesh Dutt Singh for the Petitioner.

Mr. Orr, Deputy Legal Remembrancer, for the Crown.

B. C. Rule made absolute.

**CIVIL APPELLATE JURISDICTION.** Before SHARFUD-DIN and COXE, JJ. APPEAL FROM APPELLATE ORDER No. 207 OF 1908. DURLAV PRA-DHAINA AND ANR., Appellants v. MAHOMED MAINUDDI BEPARI AND ANOTHER, Respondents. 28th January 1909.

*Appeal—Bengal Tenancy Act (VIII of 1885), sec. 173—Auction-purchaser if may appeal.*

The Court of Appeal below set aside a sale in execution of a rent decree on the ground that the auction-purchaser was the *benamidar* of the judgment-debtor. The order was passed under sec. 173 of the Bengal Tenancy Act. The auction-purchaser appealed.

*Held*—An auction-purchaser had no right of appeal against an order passed under sec. 173 of the Bengal Tenancy Act.

*Chandmonee Dassya v. Santomonee Dassya* (1 L. R. 24 Cal. 707) distinguished.

Babu Harendra Narayan Mittha (for Babu Satish Chunder Ghosh) for the Appellants.

Moulvi Serajul Islam for the Respondents.

A. T. M. Appeal dismissed.

**CIVIL APPELLATE JURISDICTION.** Before MOOKERJEE and CARNDUFF, JJ. APPEAL FROM APPELLATE DECREE No. 462 OF 1907. GOLAP SINGH AND ANOTHER, Plaintiffs, Appellants v. INDRA COOMAR HAJRA AND OTHERS, Defendants, Respondents. Heard, 8th January 1909. Judgment, 28th January 1909.

*Account-suit—Preliminary decree—Application under sec. 108, C. P. C., dismissed for default—Power of Appellate Court to set aside preliminary decree on appeal from final decree—Power of Court to pass decree for amount exceeding pecuniary limit.*

The Plaintiffs-Appellants commenced an action for accounts and recovery of account papers from the Defendants-Respondents who were alleged to have been their agents for the management of certain immovable properties. The claim for account papers was valued at Rs. 50 and that for account at Rs. 150. The suit was instituted in the Court of the Munsif, and the Plaintiffs stated in their plaint that if the amount due from the Defendants was ascertained to be in excess of Rs. 150 Court-fees would be paid on such excess amount.

The suit was heard *ex parte* and a preliminary decree for accounts made, but the decree was set aside

under sec. 108, C. P. C. The case then came on for trial, and, by agreement of parties, an order was made for reference to arbitrators who were directed to submit the award, on the 3rd November 1905. On that day the Plaintiffs applied that the time for submission of the award might be extended. The Court refused their application and proceeded then and there to hear the suit on the merits. The case was heard *ex parte* again, with the result that a preliminary decree for accounts was made. The Defendants applied under sec. 108, C. P. C., but the application was dismissed for default. The accounts were then examined by a Commissioner and his report was to the effect that Rs. 8,424 were due to the Plaintiffs from the Defendants.

The Munsif held that it was not competent for him to make a decree in excess of Rs. 1,000, the pecuniary limit of his jurisdiction. The Plaintiffs thereupon paid the balance of the Court-fee to bring up the claim to the full amount of Rs. 1,000 and a decree for that sum was finally passed in their favour. Two appeals were preferred by both parties to the Subordinate Judge, the Defendants contending that the Munsif ought not to have proceeded with the trial of the suit on the merits, upon the failure of the arbitrator to submit their award, inasmuch as no order had been made fixing that date for the final hearing of the case in the event of the failure of arbitrators to submit their award: the Plaintiff contending that the Munsif should not have limited the decree to Rs. 1,000 but should have passed a decree for Rs. 8,428. The Subordinate Judge allowed the appeal of the Defendants and dismissed that of the Plaintiffs. The Plaintiffs appealed to the High Court.

*Held*—That the Subordinate Judge had jurisdiction in an appeal against the final decree to set aside the preliminary decree, although no appeal had been preferred against the latter, and an application to vacate it under sec. 108 had been dismissed for default, and he had jurisdiction to question the preliminary decree under sec. 591, C. P. C.

The jurisdiction over the subject-matter can be given only by law and cannot be conferred by consent. If a Court of limited pecuniary jurisdiction took cognizance of a suit in which the sum claimed was larger than the amount over which the Court had jurisdiction, any judgment it might give would be void. If the Plaintiff is entitled to a sum in excess of the limit of the pecuniary jurisdiction of the Court in which he had instituted his suit, the judgment should be only for the sum which limits the jurisdiction.

Babus Ram Chandra Majumdar and Hari Charan Sarkhel for the Appellants.

Babus Mahendra Nath Roy and Sib Chandra Palit for the Defendants.

A. T. M.

Appeal dismissed.

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### REPORTS (See Index.)

MR. JUSTICE CHITTY WILL PRESIDE OVER THE  
First Criminal Sessions for the present year which  
commences its sitting from date.

WE DEEPLY DEPLORE THE DEATH OF BABU ASHU-  
tosh Biswas, the Public Prosecutor at Alipur, from  
the hands of an assassin. It has cast a gloom on  
the legal profession and particularly on the Indian  
community in Calcutta, with many prominent  
members of which he was connected either by the  
ties of relationship or close friendship. At the  
Calcutta University he won special distinction in  
history and political economy. A man of his  
attainments naturally made his mark in the legal  
profession. In the early part of his career he  
was identified with political movements and  
journalism of a progressive and healthy type. On  
accepting the office of Public Prosecutor his sense  
of duty to the State made him sever all con-  
nection with politics. In the honest discharge of  
the duties of his office, not even the most zealous  
counsel for the defence could accuse him of un-  
fairness or want of fair-play. Amongst his wide  
circle of friends, he was very popular for his cheer-  
ful disposition, genial manners and genuine good  
nature. He was uniformly obliging to all and  
particularly kind to the junior members of his Bar.  
True to the Hindu traditions, a cool passive courage  
in the discharge of his duty, indifference to any  
precautions to guard himself against the evil-minded  
or evil-doers, confidence in the pursuit of the  
right path combined with a profound faith in  
the inscrutable Will of the Almighty, were a part  
of his religious creed. In dying at his post and in  
the fair and fearless discharge of his duty he  
has truly died the death of a hero and we convey

our heart-felt sorrow and sincere condolence to the  
bereaved family. We can state it on the authority  
of the counsel for the defence in the Alipur con-  
spiracy trial that nothing could have been more  
fair than the attitude of the late Babu Ashutosh  
Biswas. As for the anarchism of which he has  
fallen a victim, if anything was needed to deepen  
the public hatred and indignation for this loath-  
some form of foreign political crime this consum-  
mation has at last been reached by this despicable  
deed.

WE DRAW ATTENTION TO THE JUDGMENT OF  
*Upendra Nath Bagchi v. The Emperor* reported  
at p. 340 of this number. In this case a pleader  
when cross-examining a witness put certain ques-  
tions defamatory of the witness from his own  
recollection of matters which transpired in pre-  
vious cases. The question was whether the pleader  
in so doing had exceeded his privilege. Their  
Lordships have very properly held that it would  
be dangerous, specially in the mofussil, if pleaders  
were not allowed to put questions based on their  
own recollection, unless they had previously taken  
extraordinary measures for verifying their im-  
pressions so as to eliminate all chances of error,  
however honest. Their Lordships also expressed  
their thorough approval of the law as laid down in  
the Bombay case, *In re Nagarji Trikamji*, I. L. R.  
19 Bom. 340, where it was held that to bring home  
against a pleader a charge of defamation in re-  
spect of words spoken or written in the perfor-  
mance of professional duty express malice must  
be proved. The decision will be welcomed by the  
profession and it will surely take rank as a leading  
case on the question of privilege of advocates.

THE WHIPPING ACT AMENDMENT BILL HAS  
after a year been referred to a Select Committee.  
In commenting on the Bill last March (see Vol.  
XII, Notes, pp. 97-8, 110-12, and 158-59) we  
urged that casual or technical thefts should be ex-  
cluded from amongst offences punishable with  
whipping as larceny in English law is not so punish-  
able. We also pointed out that it is high time  
that some provision should be made in the Bill for  
giving effect to the suggestions of the Indian Law  
Commissioners and those of the Calcutta High  
Court that persons "of decent station in life"

should not be whipped. This is the expression that was used by the Law Commissioners and the objections advanced by them against publicly disgracing such persons have often been reiterated by High Court Judges. Sir Harvey Adamson in introducing the Bill last year expressed the same sentiment in, perhaps, a more pointed manner in saying that it should never be inflicted "when it is likely to outrage self-respect." We have, therefore, a right to expect that legislative expression should be given to these authoritative opinions in the Bill itself. This may very well be done by the extension of the exemptions, sec. 393 (a) of the Code of Criminal Procedure, not merely to "females" but, in the words of the Law Commissioners, to persons "of decent station in life." We have another suggestion to make with regard to the general provisions of the Bill and that is that pending the final disposal of a motion for the revision of a sentence of whipping by the High Court the sentence should be suspended. The justice of this longstanding public demand is now admitted by many a highly-placed judicial and executive officer.

WE HAVE ALSO SOME SPECIAL SUGGESTIONS TO offer with reference to provisions of the Bill relating to juvenile offenders. Commenting on the Bill last year we welcomed the provision in it that in the case of such offenders whipping should be limited to 15 stripes. But on further consideration we see no reason why there should be any difference in the law in this country and in England in this respect as well. In England the law is that boys under 14 years cannot be punished with more than 12 strokes of the birch rod. No doubt here all youths below 16 years of age are classed as juvenile offenders. But if the climate, physique and the instrument of punishment in both countries are taken into consideration, it cannot be reasonably doubted that the provision in the present Bill is much more severe than that in the English law. An Indian rattan is a much more formidable instrument of punishment than the English birch rod. Indian youths are much weaker in physique than English youths, and staying power in cold countries is much greater than in the tropics. Considering all this we think that the limiting of the number of strokes to 12 in the case of juvenile offenders in this country will be both humane and reasonable. We would also urge on the Legislature to adopt the further limitation that the sons of parents "of decent station in life" should not be whipped.

THE INDIAN LAW COMMISSIONERS, NO DOUBT, EXPRESSED AN OPINION IN 1837 THAT IN COUNTRIES WITH ill-regulated prison system a moderate amount of flogging of young offenders is preferable to submit-

ting them to the contaminating influence of jails in India. But the Law Commissioners were in favour of wholesale abolition of flogging and they in fact put flogging outside the pale of their draft Penal Code. When whipping was revived by Act III of 1844, it was done so provisionally, or in the words of the Act, "until adequate improvements in prison discipline can be effected." Surely in the year 1909 it will not be creditable on the part of the Government to re-enact that all offences not punishable with death may in the case of youthful offenders be punishable with whipping. We have now got reformatory schools, juvenile prisons and in this age of prison reforms such a drastic provision of the law cannot with any propriety be left unmodified. It is time that the power given to the Governor-General in Council to exempt such offences as he may think fit from being punishable with whipping may more appropriately be exercised through the Legislature. Most of the trivial or technical offences or such offences as youths may commit inadvertently or through immature judgment should at any rate be exempted. Most of the cases in which the Legislature thought in former days that a moderate amount of flogging would be preferable to throwing a young man into prison, would, in the present day, be covered by sec. 562 of the Code of Criminal Procedure relating to "first offenders" or sec. 31 of the Reformatory Schools Act. In civilized countries first or casual offences by youths unless they be of a very heinous nature would not be visited by any punishment. Ordinarily in such cases young offenders are made over to parents and guardians to be of good behaviour for a definite period. Having regard to such legislation we are of opinion that the Whipping Bill requires very material modification with regard to juvenile offenders. We may also in this connection suggest that the Government should take steps for the establishment of Juvenile Courts in this country. From such Courts the public should be excluded and should any flogging by way of school discipline be administered in such Courts, care should be taken that no report of it be published in the newspapers. (See 12 C. W. N., Notes, pp. 101—104).

#### CURRENT INDIAN CASES.

- NARAIN PRASAD *v.* MUNNIE LAL, I. L. R. 30 All. 329, *Pre-emption*.

Plaintiffs were co-sharers in resumed *muafi* land a portion of which was the subject-matter of the sale sought to be pre-empted. The provision of the *wajib-ul-arz* was that if from among the *qalikan* any co-sharer wished to sell his *haqqiat*, he would first sell the same to a co-sharer in the property and in case the latter refused to purchase then to any one he liked. The *muafi* in question was resumed before the preparation of the *wajib-ul-arz*.

held, that the word *malikan* must be taken to include the proprietors of the resumed *muafi* and that the co-sharers in the khewat in which the land was situate have a preferential right to preempt over co-sharers in lahd in a different khewat of the resumed *muafi*.

**JWALA v. GANGA PRASAD**, I. L. R. 30 All. 331. *Criminal Procedure Code, sec. 145—Specific Relief Act, sec. 9.*

Where Plaintiff in a suit under sec. 9 of the Specific Relief Act was forcibly dispossessed on the 10th of February and in a proceeding under sec. 145, Cr. P. C., it was found that Defendant was in possession on the date of the proceeding, *viz.*, the 23rd of February,

Held—That the order under sec. 145, Cr. P. C., was no bar to the suit.

**EMPEROR v. TALA KHAN**, I. L. R. 30 All. 334. *Criminal Procedure Code, secs. 123, 397.*

An order detaining a person under sec. 123, Cr. P. C., is to be considered a sentence of imprisonment; an order for imprisonment on failure to furnish security is a sentence under sec. 397, Cr. P. C.

**HANWANT v. RAMGOPAL**, I. L. R. 30 All. 348. *Civil Procedure Code (Act XIV of 1882), sec. 367.*

A dispute within the meaning of sec. 367, C. P. C., need not be between persons claiming to represent the deceased Plaintiff.

**EMPEROR v. MATA PRASAD**, I. L. R. 30 All. 351. *Criminal Procedure Code, sec. 537.*

Sec. 537, Cr. P. C., does not cover the illegality where an accused person was charged with and tried for three separate acts of criminal misappropriation within a year and, secondly, two separate offences of forgery with intent to conceal two of such acts of criminal misappropriation.

### Review.

THE CODE OF CIVIL PROCEDURE. Being Act V of 1908, with an Appendix containing the Provincial Insolvency Act, the Arbitration Act, the High Court Charter Act, the Letters Patent of the High Courts, the Statement of Objects and Reasons and the disposal of provisions of the Old Code and of this Code. By Gopal Chandra Ghosal and Hem Chandra Mitra, Vakils, High Court, Calcutta. Published by Bibhuti Bhushan Mitra, 29, Hazzari Ma's Lane. 1909. Price Rs. 8.

This is a cheap and handy edition of the new Civil Procedure Code. The case notes do not profess to be exhaustive but they are well selected and handled with both insight and care and should

be found sufficient for all ordinary purposes. The Appendix containing the Charter Act, the Letters Patent of the High Courts, the Provincial Insolvency Act, and the Arbitration Act would certainly be found useful by reason specially of the brief notes of cases added by the authors. The notes throughout are brief and lucid. The paging is somewhat peculiar, but this will not seriously take away from its usefulness as a practitioner's handbook.

### Notes of Cases. CALCUTTA HIGH COURT.

Recent Decisions not yet reported.

(The important cases to be fully reported hereafter.)

**CRIMINAL REVISIONAL JURISDICTION.** Before HON. WOOD and RYVES, JJ. CRIMINAL REVISIONAL No. 1386 of 1908. DUDHAI MONDAL, Complainant, Petitioner v. RAMANATH SADKHAN AND OTHERS, Accused, Opposite Party. 18th January 1909.

*Co-accused—Issue of process against—Complainant's right to proceed against the accused other than those who have been convicted.*

The Petitioner lodged an information to the effect that the accused, Ramanath Sadkhan, with the help of six other persons forcibly took possession of a plot of land belonging to the Petitioner and in the course of taking such possession caused hurt to the Petitioner's men by the order of the said accused Ramanath. The Police sent up only three of the accused who were convicted by the Deputy Magistrate under secs. 147 and 325, I. P. C., and sentenced to 3 months' rigorous imprisonment each. The Petitioner then applied to the Deputy Magistrate for issue of process against the other accused and the Deputy Magistrate passed the order, *viz.*, "I don't see any reason to call any other accused for trial. Rejected." The Petitioner then moved the Sessions Judge who referred him to the District Magistrate. Accordingly the District Magistrate was moved. But the District Magistrate, after having issued a rule upon the opposite party to show cause why they should not be proceeded against, discharged the rule on the 24th November, 1908, by his order of the same date. In the order he observed *inter alia* that the complainant had got sufficient revenge by the conviction of the 3 men and the law had also been vindicated and as it was not shewn that the important men of the accused party had not been punished, he declined to interfere with the discretion of the trying Magistrate.

The Petitioner then obtained this rule from the High Court. After hearing the rule

Their Lordships observed:—"We know of no authority and we have been referred to none by

he learned District Magistrate was enabled a Magistrate to decline jurisdiction where there has been a legal complaint against persons against whom there is *prima facie* evidence. It may be sometimes expedient for the authorities to stay their hands after a charge of people have been convicted, but the authorities are not to be offended against claims to have the provisions of law which can prevent the case from proceeding. The rule must therefore be made absolute and processes be issued against the other accused against whom it was found that there was evidence.

*Mr. K. N. Chaudhuri with Babu Sarat Chandra Sanyal for the Petitioner.*

B. C.

*Rule made absolute.*

CIVIL APPELLATE JURISDICTION. Before BRETT, J. APPEAL FROM APPELLATE DECREE NO. 1411 OF 1907. KARTIK CHUNDER MANNA, Appellant *v.* GURU PROSAD MANNA AND OTHERS, Respondents. Heard, 18th, 19th and 20th January. Judgment, 20th January 1909.

*Civil Procedure Code (Act XIV of 1882), sec 30—Notice, service of—Court's duty.*

The appeal arose out of a suit by the Plaintiffs Respondents and several others on the allegation that they, in common with the inhabitants of certain villages, had certain rights over the *khal* running through the village and that the Defendants by erecting two dams in the *khal* had interfered with the enjoyment of those rights and the suit was brought for a declaration of those rights and for a permanent injunction. The Plaintiffs brought the suit as representing the inhabitants of five different villages, and when the plaint was filed an application was made for permission of the Court under sec. 30, C. P. C., to bring the suit and for issue of notices under the same section to the other persons interested in it. An order was passed on the same day to the effect that notices do issue under sec. 30, C. P. C. When the Munsif came to dispose of the case after arguments of pleaders on both sides, it was brought to his notice that as the suit was one falling under the provisions of sec. 30, it was necessary for him to find whether notices had been served on the persons who were interested jointly with the Plaintiffs in bringing the suit. He then looking to the evidence came to the conclusion that the service of notice was not satisfactorily proved, that the provisions of sec. 30 could not be applied and that the suit could only be taken as one brought by the Plaintiffs on their own behalf. He then went into the question of special damage and gave the Plaintiffs a decree for the reliefs claimed against the Defendant. On appeal the judgment and decree of the Court of first instance were upheld. The Defendant appealed to the High Court.

*Held*—That after the suit had been instituted as one coming under the provisions of sec. 30, C. P. C., in which numerous persons had interest and after the Plaintiffs had applied for permission to sue on behalf of all the villages and the Court of first instance had, in fact, treated the case as one falling under sec. 30, C. P. C., that Court ought not afterwards, without amending the plaint, to have allowed the frame of the suit to be altered and to have treated it as one brought by the Plaintiffs on their own behalf.

It is the duty of the Court to proceed with a suit under sec. 30, C. P. C., to satisfy itself when the suit comes on for hearing, that the notices have been duly served.

*Babu Monmatha Nath Mukherjee for the Appellant.*

*Babus Mahendra Nuth Roy and Hari Bhushan Mukherjee for the Respondents.*

A. T. M.

*Appeal allowed.  
Case remanded.*

CIVIL APPELLATE JURISDICTION. Before HARINGTON and BRETT, JJ. APPEAL FROM APPELLATE DECREE NO. 2314 OF 1906. ISMAEL AND OTHERS, Appellants *v.* ALI MAHOMED AND OTHERS, Respondents. 22nd January 1909.

*Tenancy, declaration of, suit for—Rent, payment of—Subsequent registered kabuliya—Undivided share, possession of.*

This was an appeal by the Defendants in an action which was brought by the Plaintiffs for a declaration of their tenancy right to a plot of land in which they claimed the entire right. It was found that, as to 10 annas of the land in question, the Plaintiffs established their title and that they failed to establish their right as regards an undivided 6 annas share to which some of the Defendants were entitled.

*Held*, affirming the decision of the lower Appellate Court, that when it was proved that the Plaintiffs had paid a premium and that they had paid the rent in respect of the land in question, they (the Plaintiffs) had *prima facie* shown that they were in the position of tenants.

When the rights claimed by the Plaintiffs might legally be created by words of mouth, those rights cannot be disturbed by the granting afterwards of registered *kabuliya*.

A party can be put in possession of an undivided share in a property jointly with other co-sharers. *Hari Charan Bose v. Raja Ranjit Singh* (1 C. W. N. 521) distinguished.

*Babu Harendra Narain Mitra for the Appellants. Babus Sarat Chunder Bysak and Biraj Mohan Mojumdar for the Respondents.*

A. T. M.

*Appeal dismissed.*

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### REPORTS (See Index.)

WE UNDERSTAND THAT OWING TO ILL HEALTH the Hon'ble Sir Francis William Maclean, Kt., K. C. I. E., Chief Justice of the High Court of Judicature at Fort William in Bengal, has tendered the resignation of his appointment under sec. 4 of the Charter Act of 1861 (24 & 25 Vict., C. 104) with effect from the 12th March 1909. The members of the Calcutta Bar will entertain His Lordship to a dinner on Saturday the 6th of March.

WE DRAW ATTENTION TO OUR NOTE OF THE recent contempt proceedings against Mr. Nield, M. P. at p. cx and to the following comments of the *Law Times* on the same.

It was manifestly impossible that the remarks made by Mr. Nield, M. P., with reference to the Bottomley prosecution could have been allowed to pass unnoticed, and certainly the penalty imposed upon him by the Divisional Court on Tuesday last cannot be said to have erred on the side of severity. Everyone will be prepared to accept Mr. Nield's expressions of regret, and also the statement that the speech was made without premeditation or preparation, but, at the same time, public men, and especially those who are members of the Bar and deputy chairman of the quarter sessions, should not allow themselves to be carried away by their eloquence. That the words uttered by Mr. Nield in his after-dinner speech were calculated to produce an atmosphere of prejudice no one can doubt, for, as Lord Alverstone pointed out, the suggestion was that a prosecution had been started by the Government against a person at whose political conduct they were feeling resentment.

v. Chetti, observes that the Indian Courts would recognise the validity of the marriage and of the decree of the English Court. We have no doubt whatever that they would. The comments of the *Law Times* will be found reproduced in another column.

IT IS ANNOUNCED THAT SIR THOMAS RALEIGH has been appointed a member of the Council of the Secretary of State for India in the place of Sir Lawrence Jenkins. It is difficult to understand on what principle such appointments are made. The ex-Law Member to the Government of India never got much chance of studying Indian questions for himself under the overpowering personality of Lord Curzon. In his time no solid measure of legislation was passed through the Council. All the labours bestowed on the Code of Civil Procedure by a variety of people only served to swell the size of the Law Member's portfolio. On his retirement the entire scheme of the draft Code had to be changed and it was after considerable expenditure of time and trouble on the part of his successor and of some eminent judges and lawyers that the Code emerged out of the legislature in its present form. The only measure of importance with which the name of the late Law Member will long be associated is the Universities Act. There is however very little of law in this measure and as for its policy, in all fairness, we ought to give its full credit to Lord Curzon. The greater part of the ex-Law Member's time and career in this country was occupied in sitting and deliberating on the Universities Commission. How the experiences so gained would come useful in the India office, it is somewhat difficult to divine. He was never a practicing or practical lawyer and as a reader of English law at the Oxford University his contribution to the legal literature is confined to some lecture notes on the law of Real Property. At the Oxford Union he was a pleasant and regular speaker. His acquaintance with Lord Curzon commenced at Oxford and his admiration for him found full scope in hearing the ex-Viceroy's Indian speeches. Sir Thomas may yet justify his appointment if he would utilize his Indian experience in avoiding the errors of the ex-Viceroy in deliberating upon the many momentous questions that are awaiting the decision of the Secretary of State for India at the present moment.

THE CONTEMPORARY, THE *Law Times*, IN NOTICING at length our comments on the case of *Chetti*



THE INTERESTING QUESTION WHETHER A PERSON who has transferred on lease a house to another for the purpose of being used for immoral purposes could by recourse to law eject the lessee on the breach of a covenant, was discussed in the case of *Bani Muncharam v. Regina Stangir*, I. L. R. 32 Bom. 583. The facts are that the Plaintiff let out a bungalow to the Defendant, knowing that the bungalow would be used by the Defendant as a brothel, on condition that if the rent reserved be not paid at the due dates, the lessor would be entitled to re-enter upon the premises and the lessee would be bound to vacate the same. The lessee made default in the payment of the rent on which the lessor served a notice upon her (the lessee) to vacate the premises within twenty-four hours and to pay the rent due. On refusal of the lessee, the lessor brought a suit for her eviction.

RUSSEL, J., BEFORE WHOM THE CASE CAME ON for hearing held that the Plaintiff must fail, observing, "in the present case the Plaintiff must put in the forefront of his plaint the agreement to which he has been a party, but which was an immoral one *ab initio*." The proposition is stated in Broom's Legal Maxims, 7th Edition, at pp. 547 and 548 thus: "The maxim *pari delicto potior est conditio possidentis* is as thoroughly settled as any proposition of law can be." "It is a maxim of law established, not for the benefit of the Plaintiff or Defendants, but it is founded on the principles of public policy, which will not assist a Plaintiff who has paid over money or handed over property in pursuance of an illegal or immoral contract, to recover it back, for the Courts will not assist an illegal transaction in any respect. The maxim is, therefore, intimately connected with the more comprehensive rule of our law, *ex turpi causa more oritur actio* on account of which no Court will "allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal."

IF THE PLAINTIFF IN THIS CASE SOUGHT TO evict the Defendant by way of enforcing the covenant contained in the lease, surely he could not get any assistance from the Court. But could it be said that the Plaintiff had lost all his rights to the property simply because he transferred it for an immoral purpose? The Plaintiff might not be able to recover the rents due to him under the lease, because he could not make out his title to the rent except through the medium of the immoral lease. The decision in *Gourinath v. Madhumani*, 9 B. L. R. (A. C.) 37 is to this effect. But the case is different when the Plaintiff asked to get back his property from the hands of the lessee on the allegation that the lease was

a void one being for an immoral purpose. The quotation from Broom's Legal Maxims shows that Courts will not assist an illegal transaction in any respect or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal. But when the Plaintiff asked for the recovery of property transferred by an illegal or immoral lease, he asks the Court not to assist an illegal transaction but only to avoid it.

SEC. 6, CL. (h) OF THE TRANSFER OF PROPERTY Act lays down that no transfer can be made for an unlawful object or consideration within the meaning of sec. 23 of the Contract Act. This shows that a transfer in contravention of the provisions of this section is null and void, and if this is so the transferor's rights to the property should remain unaffected by the transfer. The Indian Trusts Act, which however does not extend throughout the whole of British India, contains provisions in sec. 84 which also throw some light on the question. The section enacts that in some cases where property is transferred for an illegal purpose, the transferee must hold the property for the benefit of the transferor; and these cases are— (1) where the illegal purpose for which the property has been transferred is not carried into execution. (2) Where the transferor is not as guilty as the transferee. (3) Where the effect of permitting the transferee to retain the property might be to defeat the provisions of any law. It may be asked what will be the position of the transferor in places where the Indian Trusts Act does not apply or in cases which do not fall within the section. On general principles, however, it admits of little doubt that if the transferor can make out his case in a Law Court without in any way relying upon the illegal transfer, he ought to succeed. For the refusal of any relief to him would only perpetuate the evil which it is the policy of law to discourage or avoid. And this seems also to be the opinion of the learned Judge who decided the case, although he dismissed the Plaintiff's suit, but that he did on the ground that according to the frame of the suit the Plaintiff could not make out his title except through the medium of the immoral transaction.

#### THE STATUS OF WOMEN IN HINDU LAW.

Like all other systems of law, except the most modern, Hindu Law gives only limited powers and rights to the woman and she is never considered as attaining to full civil liberty. It would be interesting to enquire how far the limitations on her rights are based on any general principle. The source of these rights and their limitations is very largely to be sought in the history of Hindu social institu-



tions. Though such history is bound to be conjectural and uncertain, it may not be altogether barren of results. But there is also another point of view from which these facts may be studied, *viz.*, from the standpoint of the Hindu theory of law; for it must never be forgotten that in its developed form Hindu Law not only ratified existing customs and institutions but also developed a very interesting theory of law. It may not be difficult to find out the principle which guided Hindu lawgivers in retaining and supporting the limitations on a woman's civil rights and such an enquiry is likely to be not altogether unprofitable to the practical lawyer.

These limitations relate principally to (1) personal status, (2) rights relating to children and (3) the right of property. We shall consider them in this order.

In several important respects women are regarded as enjoying full personal status. Thus for instance, a woman during coverture is capable of entering into a contract, of incurring debts on her own account and would be obviously personally liable for wrong done. She can sue and be sued independently of her husband and in Courts she is allowed to appear by attorney. According to some law-givers she is however incapable of executing a valid deed or giving evidence except in a limited class of cases.

But apart from these, women are considered as generally dependent on men. On this matter there is absolute unanimity among lawgivers. Manu says :

पिता रक्षति कीदारे भर्ता रक्षति यौवने ।

रक्षति स्वयमेव पुत्राः न स्त्री स्वातन्त्र्यमर्हति ॥

(The father protects [a woman] in maidenhood, the husband protects [her] in youth, sons protect her in her old age, woman can never attain freedom) and he repeats the same sentiment in other verses. Vishnu and Narada follow him and Yajñavalkya goes even further and lays down,

रक्षेत् कन्यां पिता विद्वां पतिः पुत्रादयस्तु वार्षके ।

भर्ता च ज्ञातयः सेवा न स्वातन्त्र्यं कंचित् स्त्रियः ।

(Father should protect the unmarried girl, husband the married and sons [should protect a woman] in old age. *In their absence their kinsmen* should protect women, the woman is never independent).

This subordination to guardians pervades the life of the Hindu woman not only in the exercise of her civil rights but according to some in all her actions. So Manu says :

अस्वतन्त्राः स्त्रियः काव्याः पुत्रैः खेदिर्वाणिभिः

विशेषेषु च लज्जन्त्य संस्थाप्याः आत्मनो वसे ।

(Females must be kept under control by their male kinsmen. Those who apply themselves to worldly things must be kept under their [*i.e.*, of

the male relation's] control.) In commenting upon this passage Medhatithi says :

स्वच्छा स्त्रीणां प्रकीर्त्यकामेषु स्वयच्छेदो न देवः । यत् किंचिदपि प्रकीर्तयेत् किंचिदुच्यते तत्र यथावयः स्वपुत्राः स्वत्यादयः संश्रयणीयाः ।

(Women should not be allowed to have liberty in acts of piety, pursuit of wealth and of pleasure. What little wealth should be spent on religious acts, &c. should have the sanction of the guardians according to the age [that is, condition of the woman whether unmarried, married or a widow]).

In this perhaps Medhatithi follows Gautama who says "अस्वतन्त्रा अस्त्री ।" (Woman is not independent in religion).

Vijñāneswara evidently does not support this view, for in commenting upon the text रक्षेत् कन्यां पिता &c., he says, प्रकीर्त्यकरणाद्वेदिति । (That is, should keep her from doing wrong). This is interpreted by the Sanskara Kaustubha as implying that the guardians have no right to prevent the woman from the performance of proper acts. It goes on,

एवमपि विविधाचरणात् स्त्री निवर्तते, तत्तदवस्थायां तत्तदधिकारः इति वचनं स्ववसाद्वाख्यानाच्च प्रतीयते । न तु विविधाचरणप्रतिबन्धोऽपि न च नित्यं काम्यव्रताद्याचरणे ज्ञातिपारतन्त्र्याज्ज्ञतो विधवानाम् अधिकारः प्रतिबन्धः ।

(So too the woman is to be prevented from doing prohibited things and in those different conditions the power is with the different persons as enumerated. This appears from the spirit of the text itself as well as from its interpretations [but there is] not a prohibition to perform proper acts as well. Nor in the performance of Nitya and Kamyā Vratas, &c., is there any bar to the rights of widows by reason of their dependence on kinsmen).

This would certainly seem to be a correct view of the principle of the above restrictions on a woman's liberties. A woman is not like the slave who has liberties only by sufferance. She has the right to do what she chooses but, lest from her want of worldly experience she should do wrong, she is protected by being placed under the guardianship of a male.

This principle also lies at the root of all those rules which place the woman on a footing of equality with the Sudra. For, an examination of Hindu caste system shows that it was a system of classification based on the intellectual capacity of men in which a very exaggerated respect is shown to the principle of heredity. The supposed intellectual incapacity of the Sudra lies at the root of all the disabilities he suffers under. This being granted, it is not difficult to see why they should be anxious to put women perpetually under the protection and guidance of men. And this would seem to explain all her civil disabilities.

A study of her powers in respect of children, natural and adopted, would point to this conclusion.

By some texts she is given the fullest rights over her children. Vashistha says :

युक्तोचितकथनः पुत्रवः मातापितृनिमित्तकः ।

तस्य प्रदानविशेषेषु माता पितापरी प्रभवतः ॥

(Since a son is the offspring of the father and mother both, in giving or selling him the power is with his father and mother).

But in the very next verse occurs the limitation, *यस्य पुत्रं दद्यात् प्रतिपत्नीयाद्वा अनतानुज्ञानाद्वा* : (The wife should not give or take a son [in adoption] except with her husband's sanction.) Manu too in describing the Dattaka son says "माता पिता वा दद्यातां वं" (Whom the father or the mother gives, &c.) and in the text ascribed to Vatsa and Vyasa we find, "दद्यान्माता पिता वा वं &c." (Whom the father or the mother gives, &c.).

In all this we find that in Hindu Law the father and mother have equal rights in the disposal of their children and in giving them in adoption. This view is supported by the Bombay authorities, *Nirnaya Sindhu*, *Vyavahara Mayukha* and *Sanskara Kaustubha*. Commenting on Vashistha's text ("यस्य पुत्रं दद्यात् &c.") the *Nirnaya Sindhu* says : *यस्य पुत्रं दद्यात्, अथवा दद्यान्माता पिता वा वं स पुत्रः दत्तः* : *यदि न तस्यास्य वचोविरोधः स्यात्* : (This is only when the husband lives for otherwise there would be a conflict with the text of Vatsa and Vyasa, viz., "He whom the father or mother gives is called the Dattaka son.") The *Mayukha*, in supporting the same view incidentally furnishes the *raison d'être* of limitation and says *अतनुज्ञा तु सधवाया एव दृष्टव्यत्वात्, विधवायास्तु तां विनापि प्रितुल्यदत्तत्वे ज्ञातीनामाज्ञया भवति* (Husband's sanction is required only in the case of the woman whose husband is living; in the case of widows [adoption] may be made even without it with the sanction of the father or in his absence of kinsmen). Then quoting *Yajnavalkya's* text *दद्यात् अथवा पिता, &c.*, it adds "यदि द्यावचकोन अवस्थाविशिष्टे स पुत्रः पारितन्त्रासुक्तः । तदभावे, वाईकादिना तस्य अवसन्तायां तु पुत्रोक्तः स्यात्" (By this *Yajnavalkya* declares the subordination to husband only in a certain condition. In his absence or when he is incapacitated by age or other causes [there is subordination] to sons and others also).

This as well as *Kamalakara's* comment already quoted would go to show that according to these commentators the real reason for restricting the woman's powers in respect of giving and taking in adoption was the obvious one of her natural tutelage to men and her assumed incapacity to judge things properly. The natural conclusion that they draw is that the control of the husband is required only as a corrective to the wife's weaker intellect

and that this corrective may be furnished in the absence of the husband by the sanction of the guardian for the time being. This is also the real principle underlying the rule requiring the sanction of Sapindas which is in force in Madras.

The views quoted above undoubtedly represent a frank and honest attempt to interpret the Hindu Law of the Smritis. But a great deal of dust has been blown into the discussion of the question in Bengal by raising false issues. The *Dattaka Chandrika* interprets Vashistha's text to mean that the wife can only adopt or give a son in adoption as an agent of her husband with his sanction which neither common sense nor the rule of interpretation bids us suppose. From this it is argued that the mother cannot give or take a son in adoption unless the husband has permitted the adoption or gift even though at the time of adoption or gift he be dead. With reference to the gift of a son in adoption however such permission is to be presumed in the absence of express prohibition, on the principle, *अप्रतिविज्ञं परमतम् अनुमतम्*, (That which is not forbidden is permitted).

*Vachaspati Misra* whose authority is respected in Mithila, while holding the agency theory, more consistently requires the sanction to be given at the time of adoption. So on this view widows could never adopt.

It seems that these commentators have wholly lost sight of the true principle of Vashistha's rule which has been pointed out by the Bombay authorities. In this view of the texts, the dictum of *Jenkins, C. J.*, in the case of *Lakshmbai v. Saraswati Bai*, I. L. R. 23 Bom. at p. 794, appears to be fully in accordance with the principles of Hindu Law. "Though at first sight" observes his Lordship, "it might appear that the husband's right to forbid indicated that his authority, either express or implied, was necessary, still it may well be answered to this that his right to forbid and the widow's consequent disability to adopt are referable rather to the paramount duty incumbent on a Hindu wife to obey her husband's command than to a delegation of power from him." In laying down the law relating to the assent of the Sapindas the Judicial Committee observed in the *Ramnaad* case, 12 M. I. A. 397 : "The assent of kinsmen seems to be required more by reason of the presumed incapacity of women for independence rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption." In this their Lordships have undoubtedly laid down the correct principle regulating the limitations on woman's power to adopt. Thus we see that in the matter of power over children the mother has, in Hindu Law properly interpreted, rights equal to the father and that the limitations are

ultimately due to her supposed intellectual and moral weakness which requires protection and guidance.

This view is singularly confirmed by reference to the power of giving away a daughter in marriage. The law on the subject is thus laid down by Yajnavalkya,

पिता पितामही धाता सकुल्यो अंगनी तथा ।

कन्याप्रदः पूर्वनाशे प्रकृतिस्थः परः परः ॥

(Father, grandfather, brother, a Sakulya and the mother, these are entitled to give away the daughter, each one on the death of those preceding in due order provided that he is of sound mind). In reconciling the order here set forth with the conflicting texts of Narada and Vishnu, the Mitakshara lays down the following order : 1. Father, 2. Grandfather, 3. Brother, 4. Sakulya, 5. Maternal Grandfather, 6. Maternal Uncle 7. Mother, 8. Other maternal relations.

This would seem to be at variance with the right of the mother to give away her daughter in marriage. But having regard to the public nature of the act of giving away daughter in marriage and to the incapacity of women to perform religious part of the ceremonies, it is not unnatural that the mother should be postponed to her male relatives. But a glance at the order of the male relatives entitled to give away is interesting as showing the real principles of the rule. We see that there is a remarkable correspondence between the order of these relatives and that of those entitled to the guardianship of the mother. By putting together the rule of Yajnavalkya,

रक्षेत् कन्यां पिता विद्वां पतिः पुत्रादायस्तु वार्षके ।

अभावे श्राद्धयज्ञेषां न स्वात्मनः कृतिस्तु स्त्रियः ॥

and the text of Narada,

मृते मर्त्यपुत्रायाः पतिपचः प्रभुः स्त्रियः ।

विनियोगात्तरासां भूयैषु स रक्षरः ॥

परिचीर्य पतिपुत्रे निष्कृत्ये निराश्रये ।

तत् सपित्रेषु वास्तुसु पित्रपचः प्रभुः स्त्रियः ।

(On the death of the husband, the husband's relations are the guardians of a sonless woman. They shall have full authority to control her, to regulate her life and to maintain her. When the husband's family is extinct or contains no male or when it is reduced to poverty or when no Sapinda of her husband lives, her father's side becomes her guardians).

This shows that the order of guardians of a woman would be, 1. Husband, 2. Son, 3. His Sapindas, 4. Her father's relatives. Comparing this with the list of those who would be entitled to give away her daughter we find only one variation, viz., that her father-in-law has precedence over her son and that was due to very obvious reasons.

So the guardian of the mother for the time being is entitled to give away her daughter. This it seems clearly points to the view maintained here that the limitation on her power over children is due to the supposed intellectual or moral incapacity of women which requires that she should be under the guardianship of her male relatives in order that she may not go wrong in the exercise of her powers.

We shall next see how far the limitations on her rights of property may be traced to the same source.

N. C. S.

### CURRENT INDIAN CASES.

HIMMAT v. VHAWANI, I. L. R. 30 All. 352. *Hindu law—Alienation by widow.*

A voluntary payment made by a Hindu wife in the lifetime of her husband towards the discharge of debts due by him does not entitle her after his death to transfer his property.

EMPEROR v. RAM BELAS, I. L. R. 30 All. 364. *Criminal Procedure Code, secs. 133, 138.*

A jury appointed under sec. 138, Cr. P. C., is competent to decide as to the validity of an objection that the way is not a public way.

A party applying for the jury is bound by its verdict and cannot set up a *bona fide* claim of right.

### Extract.

As was only to be expected, the decision of Sir Gorell Barnes in *Chetti v. Chetti* dealing with the validity of a marriage in England between an English woman and a Hindu domiciled in India, has attracted a great deal of attention in India. As our readers will recollect, the learned President decided that when a Hindu went through the ceremony of marriage in this country with an Englishwoman, intending it to be a binding ceremony of marriage, and, on a petition by the wife for judicial separation for desertion, sought to set up that according to Hindu law and religion the law of his domicile, and his personal law, he could not marry outside his own caste or with one who was not a Hindu by religion, he could not be allowed to set up that personal disqualification, and that the marriage was valid in this country. Our contemporary, the *Calcutta Weekly Notes*, devotes considerable space to a consideration of the case, and, while entirely agreeing with the decision of Sir Gorell Barnes, expresses surprise at the contentions put forward on the part of the husband, and at the evidence as to Hindu law given on his behalf. That journal points out that it is no doubt true that a Hindu cannot marry outside his own caste "according to Hindu law or Hindu ceremony," these last words making all the difference, for if a Hindu marries a Christian or a Mahomedan woman the Hindu ceases to be a Hindu. So if he marries a non-Hindu in any other country according to any non-Hindu form of marriage recognised in that country, the effect of it on him would be that he would cease to be a Hindu, and not that the marriage would become invalid.

In the course of the argument Mr. DeGruyter, K. C., stated that many Hindus enter into so-called marriages with

Christian women in England, and the view in India certainly was that such ceremonies are not valid marriages, to which Sir Gorell Barnes asked the question: "Do you say that these Hindus come over here knowing that in their own country these marriages are invalid, and yet deliberately enter into such marriages?" and Mr. DeGruyther replied: "I think they do." With these statements made on behalf of the Respondent the writer in the *Calcutta Weekly Notes* expresses his astonishment, and most emphatically says that these statements are neither warranted by Hindu law nor by facts. He goes on to state that even the commonest Hindu is aware that by the marriage with a non-Hindu he loses caste and ceases to be a Hindu, and cannot again contract a valid marriage in accordance with Hindu ceremonies or law of marriage. He further points out that Hindu law has nothing to do with the validity or invalidity of a marriage of one who has gone outside the pale of Hindu society, and that, although it is intolerant in so far as that it would refuse to recognise marriages with non-Hindus performed even according to Hindu rites or ceremonies, it would never go out of its way to question the validity of marriages performed according to ceremonies or rites recognised in other countries or known to other religions.

In the course of his exhaustive and exceedingly interesting judgment, when dealing with the evidence of the legal experts who gave evidence on behalf of the Respondent, Sir Gorell Barnes stated that he was not satisfied that the marriage was clearly proved to be one which would be treated as invalid in India if held to be valid here, and he went on to state that he could not find any sufficient reason given or principle stated from which it would follow that the Courts of India would apply Hindu law and usage to a case such as this, where the Respondent had acted, not in India, but in England, in defiance of such law and usage. If the statement of Hindu law given by our contemporary is correct, and we have no reason to doubt that it is, it would seem that the Indian Courts would recognise the validity of the marriage and of the decree of the English Court, for where a man has ceased to be a Hindu, Hindu law will not allow him to turn round and declare a marriage invalid on the ground that he has once been a Hindu.—*The Law Times*.

## Notes of Cases.

### ENGLISH LAW COURTS

KING'S BENCH DIVISION.—*King v. Nield, M. P.* Before LORDS ALVERSTONES, L. C. J., AND BIGHAM AND WALTON, JJ. 26th JANUARY 1909.

#### Contempt of Court—Comment on pending case.

This was a rule  *nisi* calling upon Mr. Nield, M. P., to show cause why an attachment should not issue against him for contempt of Court and arose out of the pending prosecution of Mr. Bottomley, M. P. It appears that Mr. Nield at a public dinner made the following speech:—

We cannot but admire the way in which Mr. Bottomley stood up to his own Government over the Licensing Bill, and it was a very strange thing that the Summons synchronised with the day for the final kicking out of the precious Bill, when he voted against the third reading. I do not suppose that Mr. Bottomley and I have any opinions in common on general politics, but I give him this credit—he is as straight a man as you will find anywhere in the House of Commons. In the treatment that he metes out to the legislation proposed from time to time by this Government he is fearless. If you do not agree with him you can admire the ability and fearlessness with which he condemns a measure which he is honestly of opinion is bad.

Mr. Duke, K. C., showed cause and referred to the affidavit of his client which was as follows: "I was a guest at the dinner and as such was invited to speak. There were present as I am informed about 90 people. I had not prepared any observation and I spoke on general political topics and without notes for about half an hour. I had no previous intention of referring to Bottomley or to the pending prosecution. In the course of my speech I discussed the public expenditure during recent years and in this connection I spoke of an expected deficit of hundreds of thousands of pounds but in no way connected those references with the prosecution of Bottomley. The references made to Bottomley's votes in the House of Commons and my allusion to the prosecution of him were made in terms which I cannot recall with absolute certainty. The object of my remarks so far as they related to Bottomley was to discuss his political character as a member of the House of Commons. I did not know Bottomley except by name before the Parliamentary session of 1905 and I have had but a very slight and merely formal acquaintance with him since that time. I have on no occasion had any communication with him with regard to the pending prosecution." Mr. Nield went on to say that if his speech was likely to have the effect of perverting the course of justice he wished to repudiate such an idea and to express his regret sincerely.

The LORD CHIEF JUSTICE said that Mr. Nield had not explained his use of the word "synchronising." Mr. Duke said Mr. Nield could not pledge himself as to the exact words he had spoken. He added that a question might arise as to whether the words used amounted to an attempt to interfere with the course of justice. Mr. Justice Bigham asked whether Mr. Nield was going to justify the words he had used. Mr. Duke said that that was not possible, and that his client apologised, withdrew and expressed his regret for his remark.

The case of the *King v. Tippets* and another reported in Law Reports for 1901, page 77, King's Bench Division, was referred to. In that case Tippets was convicted on six counts, the first being that he had tried to pervert the course of justice in a pending trial. Kennedy, J., referred the case to the Court of Crown Cases Reserved, and that Court presided over by the present Lord Chief Justice upheld the conviction.

THE SOLICITOR-GENERAL, in reply, said that this was a grave case. The accused was a barrister, a Member of Parliament, Deputy Chairman of the Middlesex Sessions and a J. P. His position aggravated his offence. He submitted that in a case of this sort the Court ought not to accept any apology. It may be that the Government had nothing to do with these prosecutions but numbers of people would not know this and as the Bottomley case would take a long time the speech made by the

accused would or might have a bad effect. The accused was attacking the liberal party and suggested that it was a political prosecution because Bottomley had voted against the Government on the third reading of the Licensing Bill.

THE LORD CHIEF JUSTICE in giving judgment said :—

If we cast our minds back over the numerous cases in which contempt of Court has been raised ranging back over a good many years and probably of greater importance and frequency than at the present day, one cannot have any doubt that it is a perfectly proper thing that this matter should be brought before the Court. It seems to us quite impossible that there should remain unchallenged and unnoticed by a Court which has charge of the administration of justice a suggestion that a very important prosecution has been directed at the will of the Government of the day against a political person as to whose conduct they had a feeling of resentment, and at a time when his action had given them cause to show that resentment. It would be quite impossible for it to be suggested, and it is not suggested, that such a statement is not one that this Court recognises as serious and amounting to a contempt of Court. One point of criticism which was addressed to us by Mr. Duke was that it was too absurd, and that no one who knew anything about the duties of the Public Prosecutor or the steps that would be necessary before such a prosecution could be launched, the length of time over which the preparations must be going on, and the responsibility of those who directed such prosecution could have ever entertained such an idea for a moment. It must be remembered that the public who read these comments, the public from whom jurors are drawn, are not in a position to form judgment, and are not likely to have present before their minds the essential facts which must be in existence before such a prosecution is begun. I do not wish to do more than to repeat the sentence read by Mr. Duke from the judgment of the Court of Crown Cases Reserved. It will be seen that that sentence recognises that which to my mind is the answer to the one point seriously pressed on us on behalf of Mr. Nield, that no reasonable man could have thought that the allegation was a serious one. "It would, indeed, be far-fetched to infer that the article would, in fact, have any effect upon the minds of either magistrate or judge, but the essence of the offence is conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on." I believe that to be an accurate statement of the law. In this case it has not been attempted by Mr. Nield, through his counsel, to justify this conduct. I agree that the last paragraphs of this affidavit, supplemented, if necessary, by the observations made by counsel, all amount to an expression of regret if any words of his could bear the construction or tend to create the atmosphere I referred to. I have said it was not possible for anyone in the position of Mr. Nield to do otherwise than make expression of regret. What we have to consider is whether it is sufficient, and I certainly am very much impressed by the observation made by the Solicitor-General, that no one in the position of Mr. Nield, a member of Parliament, a member of the Bar holding a very honourable position in the Middlesex Quarter Sessions, could possibly come into this Court and say he could justify an utterance which led to the inference which in our judgment was the only inference that could be drawn from the words used, *viz.* : "That it would be calculated to produce an atmosphere of prejudice in the midst of which proceedings must go on." Having expressed this view I must consider what the utterance was. Mr. Nield does not deny that though the speech was a long one, so far as this particular instance was concerned, the report in the *Shoreditch Observer* is substantially correct. That report begins with the state-

ment about the expenditure of money by the Chancellor of the Exchequer. It goes on to say : "One could not but admire the way Mr. Bottomley stood up to his own Government over the Licensing Bill," and that it was "a very strange thing that the summons should have begun on the day he gave the final kick to the Bill on the third reading." In our judgment that sentence can bear no other construction than that the prosecution was to some extent directed by the Government on grounds other than those which ought to be considered in taking the grave step of prosecuting a public man for offences such as Mr. Bottomley is said by the prosecution to be guilty of. Mr. Duke very properly indicated that taking the expressions of that report they could not be justified in any shape or way, and they could not bear any other construction. It cannot now be denied that something to that effect was said. In the first place, the affidavit takes pains to deny a mistake which is pretty obvious, that in one of the reports a reference to hundreds of thousands of pounds could not apply to the Bottomley prosecution, but it does not correct the more accurate report in the *Shoreditch Observer*. What is more important is that there is no reference in the affidavit, except at the end, to the reports in the other papers with regard to the date when the prosecution was commenced, and it is unfortunate that Mr. Nield should not have appreciated what was the inference which must be drawn from that report. In the correction he made there was no withdrawal or correction or qualification of the sentence in regard to it being strange that the summons should have fallen on the day on which he gave the final kick to the Licensing Bill. We must come to the conclusion that there was an utterance by a gentleman in his position which is calculated in our judgment to create an atmosphere of prejudice around this case. We have come to the conclusion that we cannot accept a simple apology as being sufficient for the reason that in the absence of misgiving no possible justification could be made by a man in such a position of such language having or intended to have that effect on the mind of the public. On the other side, I think there are things which ought to be said in favour of Mr. Nield. We accept his statement that it was entirely unpremeditated. It was one of those unfortunate cases of a public man, possibly in the excess of the enthusiasm of his speech, allowing himself to go too far. There was obviously no necessity for referring to this prosecution at all, and we think that a gentleman in the position of Mr. Nield should be more careful of utterances which have produced this report and to correct them if possible, so as to remove the impression which would obviously be caused. We think the justice of the case will be met if Mr. Nield pays a fine of £100 and the costs of these proceedings, the writ to lie in the office for 48 hours.

The fine was at once paid.

## CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL APPELLATE JURISDICTION. Before SHARFUDDIN and COXE, JJ. CRIMINAL APPEAL (undefended), ILLAHI BUX, Appellant v. THE KING EMPEROR. 18th January 1909.

*Criminal Procedure Code, sec. 277 (1), omission to comply with the provisions of—Whether vitiates the trial.*

The prisoner was tried in the Sessions Court and on the verdict of the jury he was convicted and sentenced to 3 years' rigorous imprisonment.

under sec. 47, I. P. C. In the Sessions the prisoner asked the Court to record that he was not given an opportunity of challenging the jurors and stated that he would have objected to being tried by Mahomedan jurors. This was recorded by the Sessions Judge with the remark that although the prisoner was not asked if he objected to the juror as his name was called out, still the prisoner was not prejudiced in any way. The prisoner then preferred an appeal from jail to the High Court. It appears that the prisoner was an old offender.

Their Lordships observed:—

"The only question that arises in this case is whether the conviction is bad by reason of the fact that the Sessions Judge omitted to comply with the provisions of sec. 277 (1) of Cr. P. C. &c., &c.

In his appeal the Appellant states that one of the jurors was a cousin of the complainant, but it does not appear that the Sessions Judge was informed of this.

The omission is doubtless a serious one and we trust that the Sessions Judge will be careful to see that it does not recur. But we find on reading the record that no honest jury, however prejudiced in favour of the Appellant, could have come to any other conclusion than that of the jury in this case. The objection (to the jury) on the ground of religion of the jurors would of course have been rejected by the Sessions Judge and the plea of relationship seems to be an afterthought. In all these circumstances we do not think that we need order a retrial, which can only have the same result, and would cause unnecessary trouble to the witnesses, who are in no way to blame for the omission. If the learned Sessions Judge had tried the Appellant by mistake without a jury, the trial under sec. 536 would not have been invalid. The error into which he has fallen is not more serious than that cured by sec. 536 (2) and need not, in our opinion, invalidate the conviction. The appeal is accordingly dismissed."

B. C.

*Appeal dismissed.*

**CIVIL APPELLATE JURISDICTION.** Before HARRINGTON and BRETT, JJ. APPEAL FROM APPELLATE DECREE NO. 1587 OF 1907. TARADAS DAS, Appellant *v.* MIR AKTAR HOSSAIN AND ANOTHER, Respondents. 29th January 1909.

*Contract—Hard and unconscionable bargain—Provision for interest unpaid.*

This was an appeal by the Plaintiff in a suit on a mortgage bond. The mortgage bond contained a stipulation that the interest on the money advanced which was 24 per cent. per annum should be paid every year in the month of Chait and that, if the interest was not so paid, it would then be

considered as principal from the month of Bysakh next and for the following year interest would be paid on the aggregate amount of principal. The lower Appellate Court refused to allow the Plaintiff's claim for interest in accordance with the terms of the mortgage bond as it was a hard and unconscionable arrangement. It also decided that Rs. 100 was not paid to the Defendants at the time of the execution of the deed and there was something like a fiduciary relation of trust between the parties.

*Held*—There was nothing unconscionable in the bargain between the parties: The provision was for interest on the amounts left unpaid upon a mortgage bond.

*Babu Sib Chunder Palit* for the Appellant.

*Babu Surendra Nath Ghosal* for the Respondents.

A. T. M.

*Appeal allowed.*

**CIVIL APPELLATE JURISDICTION.** Before BRETT, J. APPEAL FROM APPELLATE DECREE NO. 1027 OF 1906. RADHA SUNDER MITTER, Appellant *v.* GIRISH CHUNDER BANERJEE, Respondent. 8th February 1909.

*Ex-parte decree unexecuted, if admissible in evidence.*

In this appeal the main point raised was that the lower Appellate Court erred in law in holding that the *ex parte* decree obtained by the Plaintiff and his sons for rent against the Defendant was no evidence against the Defendant without proof of execution. It was contended that those decrees would have shown that the boundaries of the lands covered by those suits corresponded with the boundaries of the lands covered by the present suit. The lower Appellate Court went through the evidence of the Plaintiff and came to the conclusion that the Plaintiff's witnesses could not be relied on, that the measurement papers filed by the Plaintiff were of no value and that the *ex parte* decrees which were found to be the only evidence left were no evidence against the Defendant without proof of execution.

*Held*—That the unexecuted *ex parte* decrees were admissible in evidence, but that the lower Appellate Court really held that they were of no value as evidence.

*Babu Digambar Chatterjee* for the Appellant.

*Babus Nalini Ranjan Chatterjee and Khetra Mohun Sen* for the Respondent.

A. T. M.

*Appeal dismissed.*



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### REPORTS (See Index.)

WE ARE GLAD TO NOTICE THAT PURSUANT TO the promise of the Secretary of State for India made in Parliament last year, the Select Committee to whom the Whipping Act Amendment Bill was referred have exempted juveniles from the punishment of whipping for offences against the State as specified in Chap. VI and secs. 153A and 505 of the Indian Penal Code. It is also pleasing to observe that for offences outside the Indian Penal Code which are punishable with imprisonment the Select Committee recommend that whipping may be inflicted on juveniles in respect of such offences only as may be notified by the Governor-General in Council as being so punishable. We hope His Excellency in Council will exercise their power very judiciously and sparingly. So far, the report of the Committee is satisfactory. But we wish that the Committee had recommended the restriction of whipping to some extent even in respect of offences under the Penal Code other than political in the case of juveniles and allowed appeals from sentences of whipping and the suspension of such sentences pending appeal.

WE NOTE WITH SATISFACTION THAT THE DECREE of the Syndicate of the Calcutta University abolishing the law classes in the Taj Narayan Jubilee College at Bhagulpur, Behar National College at Bankipur, and the Midnapur College from June 1909 is

to be held in abeyance till June 1910 under a higher and more equitable decree. This is precisely the view that was pressed upon the Syndicate and the Senate of the Calcutta University by men like Sir Gurudas Banerjee, Dr. Rash Behari Ghose, Messrs. Saroda Chran Mitra, S. P. Sinha, A. Chaudhuri and others. The view of these gentlemen who deservedly command both professional and public confidence met with unanimous support from the Indian community whom the present wayward University administration affects most intimately. The Government of India is to be heartily congratulated on their most reasonable decision.

WHETHER THE LAW COLLEGES IN BEHAR and other educational centres should be founded by the University and supported out of Government subsidy or out of the surplus of the examination fees realized by the University or opportunities should be given to the existing law colleges to improve their equipment for legal education should also be considered by His Excellency the Chancellor in the same fair and equitable spirit. His Excellency should also see that no fantastic orders for the equipment of law libraries or professorial staff be imposed on the colleges. The Chancellor is well aware of, and can easily ascertain, the equipments of the different colleges at Oxford and Cambridge in these respects. We can only say that if anything in the nature of the drastic regulations of the Calcutta University were attempted to be imposed on the colleges of the time-honoured Universities in England it would only result in the cutting short of the career of the precipitous councillors. Is it too much to expect of the Calcutta University in their present educational voyage to emulate the English Universities first before proceeding farther West or to the farthest East in search of some far-off ideals? We are yet to be convinced that the science of jurisprudence is more indebted to American judges and jurists than to their English brethren.

IN THE CASE OF *Kishori Lal v. Chunni Lal*, reported at p. 370 of this issue, Lord Atkinson in delivering the judgment of the Judicial Committee observes:—

It would appear from the judgment of the High Court that in India it is one of the artifices of a weak and some-



what paltry kind of advocacy for each litigant to cause his opponent to be summoned as a witness with the design that each party shall be forced to produce the opponent so summoned as a witness, and thus give the counsel for each litigant the opportunity of cross-examining his own client.

Their Lordships then go on to say that the Courts here "ought to set themselves to render the practice as abortive as it is objectionable," and that "it ought never to be permitted in the result to embarrass judicial investigation as it has done in this instance."

THE PORTION OF THE JUDGMENT OF THE HIGH Court for the N. W. Provinces on which the above observation is founded is reproduced at p. 572. The Judges of the High Court say that "in this case a most objectionable practice which has become prevalent in these Provinces was adopted by the Defendants." Thus it will be seen that their observations were expressly limited to the United Provinces. As a matter of fact, we are not aware of any such practice prevailing to any appreciable extent in Bengal. The Judges of the Privy Council are careful not to be misled by the finding on reading. They seem to be somewhat swayed by prejudice, not sure that if they are repelled by the finding for disallowing the calling of the jury in this case it would not result in favour of justice in many instances.

THE REASON ASSIGNED BY THE HIGH COURT Judges as to why this practice is sometimes adopted is also worthy of notice. "There is," they say, "also this danger that a witness so summoned may not be called at all, and so his case having already closed he is deprived of the benefit of his evidence unless the Court permit his examination at that stage of the case. In the present case Chunni Lal though summoned by the opposite party was not called as a witness." The Judges then say that they would have given Chunni Lal an opportunity to give evidence if they had thought (as the Subordinate Judge did) that his evidence was material. But, they were satisfied on the materials already on the record that the case set up by Chunni Lal was true and it was therefore unnecessary to take his evidence. Their Lordships of the Judicial Committee have reversed this finding of the High Court and one of the circumstances on which they relied was "his (Chunni Lal's) non-appearance as a witness at the trial, to explain, if he could, the many circumstances which called for explanation from him."

THE ABOVE OBSERVATIONS WOULD SEEM TO IMPLY that their Lordships did not agree with the High Court's opinion that the Respondent, Chunni Lal, was kept out of the box by an artifice on the

part of his opponents. But at the same time their Lordships say that the practice in this instance did embarrass judicial investigation. It is difficult to reconcile these statements. We wish that their Lordships had expressed themselves more distinctly in this matter. We must not be understood, however, to take any exception to the decision of the Judicial Committee as a whole. Their Lordships have gone very minutely into the details of a very complicated case and given very cogent reasons for arriving at a different conclusion on the facts from that of the High Court.

WE MAY ALSO ADD THAT WE DO NOT UNDERSTAND their Lordships as laying down that in no case should a party be allowed to cite his opponent as a witness. Their Lordships would hardly lay down such an extreme proposition of law. We can easily conceive of a case where a party may have no other means of proving his case. But of course no party ought to be allowed to abuse this or any other process of the Court. As it is possible, however, that a strongly worded opinion of the highest tribunal like that quoted above may easily be misunderstood and misapplied, we venture to point out its proper limitations.

EX. 2. INTERPRETATION PLACED UPON SEC. 304A OF THE PENAL CODE BY THEIR LORDSHIPS HOLMWOOD AND RYVES, APPEAL IN THE CASE OF *Emperor v. Corporal E. H. Morgate* reported at p. 362 of our last issue, deserves special notice. It has been held in that case that when two persons were engaged in practising target shooting in a rash and negligent manner and by the bullet fired by one of them, the death of a man was caused, both of them were guilty of an offence under sec. 304A, I. P. C. Their Lordships held that both these persons were responsible for the death caused, though the death might be the proximate effect of the act of one of them. The view taken of the scope of sec. 304A in this case is based upon the case of *Queen v. Solomon*, L. R. 6 Q. B. D. 79. Sec. 304A says "whoever causes the death of any person by doing any rash or negligent act &c." No doubt, it may be said that if these persons had not been engaged in target shooting in the manner described, the death would not have been caused. But on the other hand it may also be asked how a person whose shot did not hit the deceased, can be said to have caused death within the terms of sec. 304A.

THE WORDS "CAUSING DEATH" HAS NOT BEEN defined in the Penal Code and they must be taken in their ordinary sense. A man who induces another to fire at a bush knowing that behind the bush there is a person who may be killed, may be said

to have caused the death of that person if he is killed by the bullet fired by the person so induced. See Ill. (8), sec. 299, I. P. C. So when A and B are engaged in target shooting, if B either expressly or impliedly asks A to fire at the target, and a man is killed by the shot, B may be said to have caused the death of the man, though his own shot did not produce the fatal effect. In this view the two soldiers who were practising at target shooting may be held to have caused the death of the person who was killed, for according to the circumstances of the case it was clear that when one was shooting, the other was in a manner inducing him to shoot.

IT SHOULD ALSO BE REMEMBERED THAT THE offence which sec. 304A contemplates punishing is culpable negligence leading to a certain consequence and the causing of death is the consequence of that negligence. So here both persons are equally guilty of that culpable negligence which resulted in the death of a person; the fact that the bullet of one killed and not that of the other is purely a matter of chance and in this view the culpability of one is hardly less than that of the other. But in the case of uncertainty as to who actually caused the death, it is still able that the person whose shot did not accused, was guilty under sec. 336, I. P. C. is the general section rendering punishable rash or negligent act endangering human life. And when it was not known which of the two fired the fatal shot, both of them were liable under sec. 336, I. P. C.

IN CONNECTION WITH THE NEILD CONTEMPT CASE we would draw the attention of our readers to the observations of Lord Morris in the special leave appeal to the Judicial Committee reported in our columns in 1899 (3 C. W. N. cccxvi) and to our article on the question in the same issue at page cccxlii. Lord Morris said:—

"Committals for contempt of Court are ordinarily in cases where some contempt *ex facie* of the Court has been committed, or for comments on cases pending in the Courts. However, there can be no doubt that there is a third head of contempt of Court by the publication of scandalous matter of the Court itself. Lord Hardwicke so lays down without doubt in the case of *In re Read v. Huggonson*. He says: "One kind of contempt is scandalising the Court itself." The power summarily to commit for contempt of Court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the judge as a person. He must resort to action for libel or criminal information. Committal for contempt of Court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice. Hence, when a trial has taken place and the case is over, the judge or the jury are given over to criticism. It is a summary process and should be used only from a sense of duty and under the pressure of public necessity, for there can be no landmarks pointing out the boundaries in all cases. Committals for contempt of Court by scandalising

the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them."

OUR ENGLISH CONTEMPORARY OF THE *Law Journal* is evidently misinformed in stating that Sir Arthur Wilson never filled any judicial position in India. Sir Arthur retired from the Bench of the Calcutta High Court with a reputation for judicial ability which has hardly been surpassed. Our contemporary says:—

For some time past the constitution of the Judicial Committee has been particularly weak so far as Indian appeals are concerned, though these appeals constitute about half the Committee's work. Sir Arthur Wilson and Sir Andrew Scoble are the only members of the Committee who have lived in India, and neither has resided there in a judicial capacity. It is a good thing, then, that the Government having, the Appellate Jurisdiction Act, acquired the power to impower the constitution of the Judicial Committee in this direction, have quickly exercised it. Sir John Edge, who for many years was Chief Justice of the North-West Provinces, is one of the sections of the Act, been appointed to the Committee, and the expert knowledge which he will bring to its work cannot but be of great service to it. The number of ex-

WHETHER TH be appointed under the new Act other educational University and sum of the Government will further the remaining place. Sir Francis Maclean will resign the position of Chief Justice of Bengal next month. And Sir Lawrence Jenkins, who was Chief Justice of Bombay from 1899 to 1908, and who is to be numbered among the most capable judges that England ever sent to her great possession, has already been appointed to succeed him.

## CASES OF 1908.

### LAND TENURES. I.

#### *Bengal Tenancy Act and Revenue Sale Law.*

TRANSFER.—Sec. 12 of the Bengal Tenancy Act speaks of a transfer by sale, gift or usufructuary mortgage; a release on a five-rupee stamp has been held to be a transfer under that section and the transfer is therefore complete as soon as the document is registered. *Hemendra v. Kumar Nath*, 12 C. W. N. 478.

PRESUMPTION.—Sec. 50 of the Bengal Tenancy Act raises a presumption as to the permanency of a tenure from uniform payment of rent but such a presumption will arise in a suit or proceeding under the Act, but it has been held now that the principle laid down in that section would apply to cases not arising under the Act: *Nyundo Lal v. Atarmoni*, 12 C. W. N. 432; s. c. I. L. R. 35 Cal. 763. Notwithstanding the provisions of sec. 115 of the Act the presumption, in sec. 50 would apply to a suit for enhancement of rent after an entry in a record-of-rights if uniform payment of rent is proved before the record-of-rights was framed. *Radha Kishore v. Umed Ali*, 12 C. W. N. 904.

**RIGHT OF SUIT OR MAKING APPLICATION.**—Notwithstanding the provisions of sec. 60 of the Bengal Tenancy Act a Defendant in a rent suit by a registered proprietor may shew that the title of the Plaintiff has been found to be void. *Girish v. Satish*, 12 C. W. N. 622. A decree for rent for the entire tenure may be obtained at the instance of the purchaser from one of the co-sharers if the others are made parties. *Sashi v. Seeta*, 35 Cal. 744. Co-sharers may join together to bring one suit for rent although they separately collect rent. *Pramada v. Ramani*, 12 C. W. N. 249; s. c. I. L. R. 35 Cal. 331. A co-sharer obtaining a separate *habuliyat* can apply for measurement under sec. 91 of the Bengal Tenancy Act. *Joguesh v. Maniruddi*, I. L. R. 35 Cal. 417.

**ABANDONMENT.**—Abandonment is the effect of a tenant's act and a notice under sec. 87 is not indispensable to effect a legal abandonment. *Ram Peshad v. Jawahir*, 12 C. W. N. 899. If an occupancy riyat mortgages his holding and the mortgagee enforces the mortgage and purchases it himself, the possession of the riyat completely ceases and there is an abandonment. *Ibid.*

**RECORD-OF-RIGHTS.**—It is a vexed question as to how an entry in a record-of-rights is to be corrected. When there was a dispute between two rival proprietors and one of them brought a regular suit to establish his right and title it was decided that a regular suit did not lie and that the remedy lay by way of a suit under sec. 106 of the Bengal Tenancy Act. *Jogendra Nath v. Krishna Pramada*, 12 C. W. N. 1032; s. c. I. L. R. 35 Cal. 1035. But it was held in the case of *Mohunt Padmalav v. Lakmi*, 12 C. W. N. 8, that in a suit by a rival landlord to have the record-of-rights corrected the Court in a suit under sec. 106 can only go into the question of possession. It seems therefore that in this respect these two cases are in conflict. In regard to proceedings commenced before the Amending Act III of 1898 (B. C.) it was held that the procedure under the new law would apply, so a reference to the Civil Court under sec. 106 as amended by Act III, B. C. of 1898, was held to be legal although the proceeding commenced before that Act was passed. *Rahimuddin v. Jagat Kisore*, 12 C. W. N. 987. Entries in finally published record-of-rights could not be corrected under sec. 108 before the passing of Act I, B. C. of 1907. In order to correct mistakes a tenant must pursue his remedy under sec. 106 or sec. 108. *Sambhu v. Purna Chandra*, 12 C. W. N. 122; s. c. I. L. R. 35 Cal. 176. Sec. 108 does not warrant the settlement officer in revising his entries as to *moat* lands in the record-of-rights. *Ibid.*

**PROPRIETOR'S PRIVATE LAND.**—Sec. 116 of the Bengal Tenancy Act does not apply to lands in a tenure, but it has been held that where Act VIII, B. C. of 1869, applies zemindar's *kamat* lands do

not cease to be so by virtue of *mokurari* settlement. *Syed Khalilpur v. Rupon Mahton*, 12 C. W. N. 436.

**APPEAL.**—The withdrawal of a portion of a claim would have the effect that the suit will be considered as valued at the reduced claim for the purpose of an appeal as provided for in sec. 153. *Shilabati v. Roderigues*, 12 C. W. N. 448; s. c. I. L. R. 35 Cal. 547. Sec. 153 applies to a suit by a co-sharer landlord also. *Bhagabati v. Nandkumar*, 12 C. W. N. 835. No second appeal lies from the decision of a settlement officer settling rent under sec. 109 of the Bengal Tenancy Act. *Shambhu v. Purna*, 12 C. W. N. 122; s. c. I. L. R. 35 Cal. 176.

**INCUMBRANCE.**—There is nothing to prevent a purchaser of a riyati holding in execution of a money-decree to re-purchase it in execution of a decree for arrears of rent and annul a mortgage of the holding. *Surendra v. Basiddhar*, 12 C. W. N. 114.

**DEPOSIT.**—The executing Court can deliver possession to a depositor under sec. 171. *Ramnaraian v. Jal Das*, 12 C. W. N. 55; but a stranger cannot be ousted by the executing Court. *Ibid.* By the passing of Act I of 1907 (B. C.), sec. 310A, C. P. C., is no longer applicable to a sale in execution of a decree, and that section was held to be not applicable where the application was made after the passing of Act I of B. C. (1907) although the sale was held previous to it. *Asiruddi v. Mukhada*, 12 C. W. N. 434; s. c. I. L. R. 35 Cal. 543.

**OUTGOING LANDLORD.**—A decree for rent obtained by an outgoing landlord is a decree for rent. *Moharaj Bahadur v. Forbes*, I. L. R. 35 Cal. 737 (see however *Nagendra v. Bhuban*, 6 C. W. N. 91).

**REVENUE SALE LAW.**—A rent-free grant created before the Permanent Settlement is an incumbrance and a purchaser at a sale for arrears of revenue is entitled to recover the assessment which was made upon the property at the time of the Permanent Settlement. *Brindaban v. Bhawani*, I. L. R. 35 Cal. 391. The principle involved in secs. 59 and 60 of the Contract Act was applied to the case of revenue sent by a money-order after the sale proclamation was published. *Jogendra v. Umanath*, 12 C. W. N. 1029; s. c. I. L. R. 35 Cal. 636. The exemption referred to in the 4th exception to sec. 37 of Act XI of 1859 must be limited to such portion of land as is covered by buildings, tanks, &c., and cannot be extended to cover those lands included in the lease on which buildings, tanks, &c., have not been constructed. *Wahid Ali v. Rahat Ali*, 12 C. W. N. 1029. The title acquired by adverse possession is extinguished by the sale of a share of an estate as the default is the default of proprietor. *Kumar Kalanand v. Syed Sarafat*, 12 C. W. N. 528.

S. C. S.

CURRENT INDIAN CASES.

PABITRA v. THE MAHARAJAH OF BENARES, I. L. R. 30 All. 367. *Recording of evidence—Remand.*

Where a part only of Plaintiff's evidence was recorded by order of the 1st Court which decreed his suit, and the judgment was reversed by the Appellate Court, *held*, that Plaintiff was entitled to get the remainder of his evidence recorded.

RAM ANANT v. SHANKAR, I. L. R. 30 All 369. *Concurrent leases, effect of.*

Where before the expiry of the first lease, a second lease is executed by the lessor to take effect before the expiry of the first, *held*, that the second lease is an assignment of the lessor's interest for the concurrent period.

RAM LAL v. BAHADUR ALI, I. L. R. 30 All. 372. *Pre-emption—Mahomedan Law.*

The material portion of the *wajib-ul-arz* upon which pre-emption was claimed was as follows:—"The zemindar of the *khalsa* is one person; hence there is no custom of pre-emption in the *khalsa*; but among the owners (*lit.* owner) of the *khalsa* and *milks* the following custom prevails." *Held*, that the *wajib-ul-arz* has no application to the sale of the *khalsa* land, and a suit to pre-empt it can only be instituted under the Mahomedan Law.

Where a property sold belonged to a Mahomedan and was therefore subject to pre-emption, *held*, that the fact that it was purchased by a Hindu makes no difference.

JAGARDEO v. PHULJHARI, I. L. R. 30 All. 375. *Limitation Act, Sch. II, Art. 91.*

Art. 91 of Sch. II of the Limitation Act has no application to a suit for a declaration that a deed is a sham one.

EMPEROR v. LACHMI NARAIN, I. L. R. 30 All. 377. *Excise Act—Excise officer.*

Where an accused was acquitted of an offence under sec. 48 of the Excise Act (XII of 1896) on the ground that the Head Constable who commenced the proceedings was not an excise officer, *held*, that the order of acquittal was wrong inasmuch as the view that the Police could not institute the proceedings was erroneous.

ANANDI v. AJUDHIA, I. L. R. 30 All. 379. *Civil Procedure Code (Act XIV of 1882), sec. 310A—Appeal.*

An appeal does not lie at the instance of an auction-purchaser against an order under sec. 310A, C. P. C.

KAMA ROW v. MUKAMMA, I. L. R. 31 Mad. 485. *Fraud.*

A party cannot allege his own fraud to escape

from the consequences of a decree fraudulently obtained.

RANGIAH v. RUNGIAH, I. L. R. 31 Mad. 490. *C. P. C., sec. 622—Presidency Small Cause Courts Act, sec. 99.*

Sec. 622, C. P. C., applies to decrees of Presidency Small Cause Courts.

Under sec. 69 of the Presidency Small Cause Courts Act reference must be made for the opinion of the High Court where the Judges in the Small Cause Court sitting in Full Bench differ on the merits.

SUNDARAPPAIYAR v. AVANACHETTA, I. L. R. 31 Mad. 493. *Insolvent Act, sec. 7.*

A purchaser at a sale in execution of a money decree does not acquire any interest in the property sold where prior to sale the vesting order under sec. 7 of the Insolvent Act is passed.

SALAKSHI v. LAKSHMAYEE, I. L. R. 31 Mad. 500. *C. P. C., sec. 266—Hindu widow's right of residence.*

Under sec. 266, C. P. C., the right of a widow to reside in her husband's house cannot be attached as it is a personal right and cannot be transferred.

AMARA v. ANNAMALA, I. L. R. 31 Mad. 502. *C. P. C., secs. 295, 490.*

The creditor is not required to take a fresh attachment of property which was attached before judgment to entitle him to rateable distribution under sec. 295, C. P. C.

MUNIAPPAN v. BALAYAN, I. L. R. 31 Mad. 505. *C. P. C., sec. 108.*

Sec. 108, C. P. C., applies to the case of a Defendant who had filed a written statement but did not appear subsequently.

SARAVANA v. SESHU, I. L. R. 31 Mad. 469. *C. P. C., sec. 574.*

The judgment and decree of the lower Appellate Court are to be set aside in a second appeal if the provisions of sec. 574, C. P. C., have not been complied with. On remand the Judge who originally heard the case is not bound to re-hear the case.

ERASALA v. ADDEPALLY, I. L. R. 31 Mad. 472. *Hindu law—Undivided family.*

In an undivided Hindu family the son may be relieved of liability of the father if it is shewn that the liability was on account of a criminal act of the father.

PULLIAH v. VARADA, I. L. R. 31 Mad. 474. *Succession Act, sec. 82—Compromise—Hindu widow. According to sec. 82 of the Succession Act a gift*



**LORD MACNAGHTEN.**—Upon what ground do you impeach it?

**Mr. Lush.**—Upon misdirection, and also upon this ground—

**LORD MACNAGHTEN.**—If it is misdirection how can we determine that without knowing what the summing up was?

**Mr. Lush.**—Your Lordships must know that, but I have the summing up—I have all the evidence, and all the documents. I do not know why the Crown are not in possession of the papers. We have had them some little time.

**LORD MACNAGHTEN.**—It seems a reasonable thing.

**Mr. Lush.**—As I say I must leave it in your Lordships' hands. If anything can be done after the petition has been heard, in the event of your Lordships giving leave, to accelerate the hearing, to make up for the delay, it would be something.

**LORD MACNAGHTEN.**—We will bear that in mind.

**Mr. Lush.**—If your Lordships will bear that in mind I should be glad. The position is obviously a very serious one.

**Sir R. B. Finlay.**—Perhaps your Lordships will allow it to stand over till the beginning of May. I hope we shall then have all the documents and the comments of the Attorney-General of this Colony. I hope it will not be a waste of time again, but, if necessary, we must apply to the Court you need not apply to the Mahomedan Law.

**Mr. Lush.**—The beginning of May is to pre-emption, held, now? Purchased by a Hindu.

**LORD MACNAGHTEN.**—Business.

J. H. W. A.

HARI, I. L. R. 30 All

PLIVY I, Art. 91.

[APPEAL FROM SUPREME COURT OF HONG-KONG.]

**LORD MACNAGHTEN.**—Kiu and

**LORD KINSON.**—Applicants,

**LORD COLLINS.**—v.

**SIR A. WILSON.**—THE JUDGES OF THE

1909, SUPREME COURT OF

3, February. HON-KONG.

Application for special leave to appeal.

The applicants prayed for leave from a judgment of several Judges of the Supreme Court who had upheld a conviction for perjury on a summary proceeding by the Chief Justice acting under a section of the bankruptcy law in force in that colony. It was contended on their behalf that not only were they not guilty of perjury but that their evidence was actually true.

**Mr. Sharp, K. C.** (Hong-Kong Bar) and **Mr. Makin** were heard in support of the petition.

**LORD MACNAGHTEN** said their Lordships reserved judgment.

J. H. W. A.

## CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

**CRIMINAL REVISIONAL JURISDICTION.** Before **HOLMWOOD** and **RYVES, JJ.** CRIMINAL REVISION No. 1382 OF 1908. **NAWAB SYED MOHIUDDIN MIRZA AND ANOTHER**, Petitioners v. **THE KING-EMPEROR**, Opposite Party. 20th January 1909.

*Criminal Procedure Code, sec. 144—Proceeding taken on proceeding under sec. 145 dropped—No fresh information as to likelihood of breach of peace.*

A proceeding under sec. 145, Cr. P. C., was going on between the *Feut Aars* and another zemindar with regard to a sale of a garden. On the 4th the respondent Magistrate dropped the proceeding prior to sec. 145, Cr. P. C., but on the following day the Insolvent Notice on the Petitioners under sec. 144, Cr. P. C., which stated that where there was a breach of peace between the *P. C., sec. 266—Husbands and those of the* to the possession of the

Under sec. 266, Cr. P. C., and the Petitioners reside in her husband's ice under sec. 144 not as it is a personal right and the same.

—against the order of the

**AMARA V. ANNAMALA,**

(The Lord's 225, 490. )

"This was a rule calling upon the District Magistrate of Puthia to show cause why the order of the Sub-divisional Magistrate of Kishengunge under sec. 144, Cr. P. C., should not be set aside on the ground that it was made without jurisdiction. The want of jurisdiction consists in the fact that the sec. 145 proceedings had been dropped on the day before and in the interim no information that it was necessary for the immediate prevention or speedy remedy in respect of an impending breach of the peace to pass such an order, had been received, and further, the order was bad inasmuch as immoveable properties cannot be attached under the section. On both these grounds we think the rule must be made absolute. The learned Magistrate says that although he did not say so, he did think that immediate prevention was desirable. But it is not a question of what he thought. It is a question of whether he had any fresh information before him entitling him to form such an opinion."

In any case the order of attachment was illegal and must be set aside.

**Mr. P. L. Roy** with **Babu Hemendra Nath Sen** for the Petitioners.

*Rule made absolute.*



**CIVIL APPELLATE JURISDICTION.** Before **BAITT**, J. **APPEAL FROM APPELLATE DECREE** No. 11 of 1907. **SUGANDHARAM PANDEY**, Defendant No. 3, Appellant *v.* **DEGHOBA MONGAL NATII RAM AND OTHERS**, Respondents. Heard, 10th February 1909. Judgment, 15th February 1909.

*Mortgage decree—Prisonal decree for costs if allowable—Civil Procedure Code (Act XIV of 1882), sec. 220.*

The appeal arose out of a suit brought on a mortgage bond executed by Defendant No. 1 in favour of the father of Plaintiffs Nos. 1 and 2 and others. The interest of Defendant No. 1 was purchased by Defendants Nos. 2 and 3, and Defendant No. 3 alone contested the suit.

The Court of first instance dismissed the suit. But the lower Appellate Court reversed the finding of the Munsif and gave the Plaintiffs a decree with costs for the sale of the mortgaged property. The decree was in the usual form, but, in pursuance with the judgment of the lower Appellate Court, a direction was added to the effect that Defendant No. 3 should be also personally liable for costs. Defendant No. 3 appealed to the High Court.

*Held*—That Defendant No. 3 was not personally liable for costs. It would be not only opposed to the scheme of the Transfer of Property Act, but also inequitable and contrary to the practice of the Courts of Equity in England to make the mortgagor personally liable for costs in any case before the sale proceeds of the mortgaged property have proved insufficient to satisfy the mortgage claim. In other words, the mortgagor personally can be proceeded against only in accordance with the provisions of sec. 90 of the Transfer of Property Act.

*Kamalamma & Kamandur Narasimha*, (1907) 1 L R 30 Mad 464, followed.

The argument that the absolute discretion as to costs given to the Court by sec. 220 of the Code of Civil Procedure was unaffected was not allowed.

*Babu Atulya Chhuran Bose* for the Appellant.  
*Babu Narendranath Ghose* for the Respondents.

A T M.

*Decree so modified*

**CIVIL APPELLATE JURISDICTION.** Before **BAITT** and **FLETCHER, JJ.** **APPEAL FROM ORDER** No. 290 of 1907. **TARUBALA DAS**, Objector, Appellant *v.* **MONI LAL DAS AND OTHERS**, Respondents. 16th February 1909.

*Under-valuation in sale-proclamation—Civil Procedure Code (XIV of 1882), sec. 311—Fraud—Dissuading purchasers*

The appeal arose out of an application made under the provisions of secs. 311 and 244 of the Code of Civil Procedure to set aside the sale of a property. The grounds on which the application was based were that the property was undervalued

in the sale-proclamation, that there was suppression of the service of process and the sale-proclamation, and that that was done by the decree-holder fraudulently for the purpose of selling the property at an insufficient price.

The Court below found that the value of the property was not as alleged by the applicant but that the value at which it was sold was its fair value; that there was no suppression of the service of notices and that the applicant had failed to prove that he had suffered any loss from any irregularity in publishing or conducting the sale or from any fraud on the part of the decree-holders. It therefore rejected the application.

The judgment-debtor appealed to the High Court and it was contended *inter alia* that the sale should be set aside on the ground that there was in the sale-proclamation such a gross under-statement of the value of the property on the part of the decree-holders as would itself amount to a fraud and would dissuade possible purchasers for the property on the ground that there was some defect in the title.

*Held*—That the sale was valid.  
*Saddatmund Khan v. Phul Koor* (L. R. 25 I A. 144) and *Mahomed Khala Mah v. A. T. Harper* (13 C W N. 244) distinguished.

*Dr. Pina Nath Sen* for the Appellant.  
*Babus Baidya Nath Dutt, Monmohun Dutt, Ram Chunder Mopundar, and Dwar'la Nath Mitter* for the Respondents.

A T M.

*Appeal dismissed*

**CIVIL APPELLATE JURISDICTION.** Before **BAITT** and **FLETCHER, JJ.** **APPEAL FROM APPELLATE DECREE** No. 170 of 1906. **SATISH CHANDRA CHATTERJI AND ORS.** Plaintiffs, Appellants *v.* **BEJOY KUMAR PAL AND ORS.** Defendants, Respondents. 18th February 1909.

*Limitation—Decree set aside—Execution proceedings set aside—Claim case—Several tenants in a holding—Separate holding*

It was held that when the whole execution proceedings were set aside after the decree had been set aside, the decision in the claim case which was brought in the course of those proceedings fell with those proceedings.

Where there are several tenants in a holding and each of them holds a separate portion of the holding, each of those portions should not be treated as a separate holding or a transfer of one of those portions will not operate as an abandonment which will entitle the landlord to re-enter that portion.

*Babus Baidya Nath Dutt and Nandlal Banerjee* for the Appellants.

*Babus Jogesh Chunder Roy and Jyoti Prasad Sarbadhikari* for the Respondents.

A. T. M.

*Appeal dismissed.*



# Calcutta Weekly Notes.

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[No. 17]

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### REPORTS (See Index.)

**SUDDEN AND UNTIMELY DEATH OF BABU OPUNDA COOMAR GANGOOLOO, Attorney-at-Law,** last Wednesday evening has cast a gloom over the profession. He was one of the most distinguished attorneys practising at the High Court and on account of his legal learning, thorough honesty, fine manners and handsome presence he was loved and respected by all. He came into contact with him. The deceased gentleman was born in 1846. He was enrolled as an Attorney of the High Court in 1886. From the beginning of his career he did large business and within a few years he rose to be one of the leading members of his profession. He was always on the look-out for merit amongst the junior members of the Bar and there is at this moment not a single leader of the Bar who is not thankful to him for his kindly assistance at the beginning of his career. By his sudden death the profession has lost an ornament and the Bengali community one of its most valued members.

WE INVITE ATTENTION TO SOME VERY VALUABLE suggestions made to us by Sir E. J. Trevelyan regarding the administration of Hindu Law, which we publish in another column. The learned writer, referring to the authority of eminent jurists, points out that the growth of customary law amongst the Hindus has been arrested by British Courts. We have often drawn the attention of the Hindu community to the very serious consequences that are sure to follow from the artificial check that has been put on the normal development of Hindu customs and usages by a series of stereotyped decisions on Hindu Law. For instance, does any sensible Hindu entertain any reasonable doubt that the customs and usages amongst the Hindus have varied from time to time with regard to marriages? If by force of

judicial interpretation the law regarding Hindu marriages be reduced to some inelastic and inflexible rules which the community feels are likely to interfere with the growth and progress of the community or any of its component parts, would it not be the duty of the leaders of the Hindu community from different parts of India to meet and decide how such rules might be varied or altered in the interest of the community? The moment we declare that Hindu customs and usages are immutable we proclaim to the world that we as a community are a dead organism. We suppose that not even the most orthodox and conservative amongst us are prepared to go this length. If that be so, then the necessity of forming an all-India committee on the lines suggested by Sir E. J. Trevelyan is apparent and a committee so formed is bound to prove beneficial. We also thoroughly approve of the learned writer's suggestion that there should be some machinery for the purpose of noting the growth of practices which are not in strict conformity with the existing law and of reporting on them to the Legislature. Such an organisation can only be formed and worked by Government. We shall be very glad indeed if the legislative departments of the Government of India and the Provincial Governments will take steps for the noting of such practices. If, for instance, the Vaishnava or Sikh forms of marriages were introduced for the first time at the present day they would surely be regarded by Hindus as innovations. But no one will have the hardihood to question their validity to-day. New sects are continually springing up amongst the Hindus. Customs and usages are also being steadily varied even amongst the most conservative communities. It would be both unjust and inequitable to declare as illegal such changes in the customs and usages whether amongst new or old sects or sections of the Hindu community so long as they are not opposed to public morals. Should any Court of law do this, it would clearly be the duty of the Legislature to correct the mischief.

## SOME SUGGESTIONS WITH REGARD TO THE ADMINISTRATION OF HINDU LAW.

BY

SIR E. J. TREVELYAN.

It is by no means certain that the administration of Hindu Law by the British Courts in India has

been 'in every respect satisfactory. We all know that although the basis of Hindu Law is said by some to be of divine origin the living principle of that law was derived from custom which has from time to time modified or altered the Brahminical law. The growth of that customary law was, as has been pointed out by Sir Henry Maine ("Village Communities," pp. 44, 45) and by Sir Gooroo Das Banerjee ("Hindu Law of Marriage," 2nd Ed., p. 7-), arrested by the British Courts. Effect has, it is true, been given to customs which are proved to have existed from time immemorial, but no allowances have been made for the change of practice in matters which are dealt with by the law as laid down in the Shastras and the Codes. On the other hand, some complaint has been made that the Courts do not sufficiently adhere to the letter of the works of ancient lawgivers (see Introduction to J. C. Ghose's Principles of Hindu Law).

There can be no doubt that many errors have been made by the British Courts, although the Judges have done their best to decide cases according to what they believe to be Hindu law. The Judges have had to rely upon traditions. The books which were first translated were authorities of the Bengal School. Decisions are given as applicable to the whole of India, and a body of case-law has grown up without reference to the many ancient authorities which have since been translated or have not yet been translated at all. In result we have a body of judge-made law which covers the whole ground of the topics upon which the Courts are required to administer Hindu Law, but it is very uncertain whether the law is accepted by Hindus either as a correct expression of the ancient law, or as a guide to them in their daily affairs.

There should be some means, other than that provided by the law Courts, for the purpose of ascertaining what is the Hindu law, which according to educated Hindus, is now considered to be in force, and there should be some machinery for the purpose of noting the growth of practices which are not in strict conformity with the existing law, but are approved by Hindus, and of reporting on them to the Legislature. The British Government has rightly abstained from interfering, except under very exceptional circumstances, with Hindu law. But if changes be advocated by a body of Hindus, whose opinion would carry weight among their co-religionists, there could be no objection to legislation.

The ascertainment of the existing law would be best left to a small committee. There might be also a body composed of representatives from different Provinces which might occasionally meet, and might from time to time recommend alterations in the law by legislation.

### SIR FRANCIS MACLEAN.

The career of the Hon'ble Sir Francis Maclean, K. C. I. E., as the Chief Justice of Bengal is contemporaneous with the life of our journal. He took his seat on the Bench of the Calcutta High Court on the re-opening of the Courts after the long vacation in 1906 on Monday the 23rd of November. In the first number of our Journal, issued on that date, we gave a short account of the learned Chief Justice's career in England. We shall therefore on the present occasion review his life chiefly in connection with his career in this country. During the twelve years that His Lordship has presided over the High Court, he has been untiring in his efforts to remove the congestion of accommodation in the Courts and offices and the accumulation of business in its different departments. Reference to our columns will show the arrears of work that had been going on accumulating both in the cause list and in the offices on the Original Side of the High Court for some time. The Hon'ble the Chief Justice took up this question in response to public demands and by the constant pressing of the claims of the Calcutta High Court succeeded in inducing the Government of India and the Secretary of State to appoint the full complement of judges provided for in the Charter of the Calcutta High Court. Since the strengthening of the High Court in this manner, three judges have often sat in three Courts on the Original Side in the place of two as was usual in former years. The result of it has been that the arrears of former years have been quickly disposed of, and commercial cases may at present be heard and disposed of within less than three months of their institution and other cases within six months and often earlier. There is no doubt that now business on the Original Side is disposed of much more expeditiously than in the Mofussil Courts. The services rendered by the Hon'ble the Chief Justice in these respects deserve the grateful acknowledgment of all communities of this city. His name and memory will always remain associated with the new wing of the High Court. The ceremony connected with its opening is still too fresh in public memory to require any but a passing reference. But we must not omit to mention in this connection that it is chiefly through His Lordship's exertions and initiative that we owe the strengthening of the ministerial staff on the Original Side of the High Court. The cause of law's delays is to be found as much in the undermanning of the Courts as of the offices connected with them. Fully appreciating this fact the Chief Justice got the Government to agree to the appointment of an Official Referee, an Assistant Referee and an Assistant Taxing Master on the Original Side of the High Court. The result of this has been that questions of account and various other incidental matters that arise out of suits which

often went to add to the suitor's misery even more than a prolonged hearing in Court, are now much more expeditiously disposed of. On the Appellate Side also the Chief Justice has added to the strength and improved the status of the clerical staff and a similar scheme has been matured by him for the strengthening of the clerical establishment on the Original Side.

It may also be mentioned that Sir Francis Maclean lent the authority of his position in helping the Government of India in improving the pay and prospects of the High Court Judges. Amongst the improvements made in this direction are: (1) The reduction of the full period of service of the Judges from 14½ years to 11½ years. (2) The increase of the salary of the Judges to Rs. 4,000 a month: (3) The reduction of the minimum period for the earning of proportionate pension from 10 years to 6 years and 9 months: (4) The enjoyment by the Judges now of the privilege of adding furlough to their vacations.

Yet if the attractions of such an honourable and none the less comfortable position on the Bench have not tempted barristers in the first rank of the profession to accept it, they and the Government are almost equally to blame for it. The competition between members of this specially privileged class of lawyers being really confined to a very limited number, professional fees have in recent years gone up by leaps and bounds and now no one in the front rank of the profession is perhaps willing to forego the opportunity of reaping a rare harvest which surely is not wholly of their own sowing. If the Government had only been alert enough to make judicious selections from amongst them before all the country's wealth commenced pouring into their brief-bags, the Government would have conferred a real blessing on the suitors. We know that even men of the ability of Sir Charles Paul, the late Advocate-General, officiated as a judge of the Calcutta High Court and it may be, a timely offer of a judgeship to men of assured ability at the Bar would not have met with a refusal. We must say, however, in justice to the profession, that the compulsory retirement of judges at the age of 60 years, perhaps without a pension, has added to the difficulty of recruiting judges from amongst the senior members of the legal profession.

Be that as it may, we must give the retiring Chief Justice the fullest credit for the reorganisation of the High Court offices and adding to the numerical strength of the Bench. Besides the additions already made, His Lordship has only recently applied for the appointment of another judge. Taking this into consideration as also the additions made by him to the ministerial and clerical staff and the High Court buildings, we can safely say that no other Chief Justice has done so much for the Court outside his judicial duties as the retiring Chief Justice.

His Lordship has during his Indian career never grudged time or trouble in taking a leading part in charitable organisations connected with Famine Relief. In 1896 he became the Chairman of the Executive Committee of the Indian Famine Charitable Relief Fund at the request of Lord Elgin and it was in recognition of his services in this connection that he was made a Knight Commander of the Indian Empire in 1898. Again in 1900 His Lordship accepted the chairmanship of a similar Famine Relief organisation at the request of Lord Curzon and for his services in this capacity he was in the following year one of the first recipients of the Kaiser-i-Hind gold medal. He was appointed Vice-Chancellor of the Calcutta University in 1898 and for many years he was the President of the Bethune College Committee and in both capacities he made himself popular.

In his judicial capacity the salient feature of his decisions has been freedom from any racial prejudice and executive bias. It must be said that His Lordship has, during the tenure of his high office, dealt out justice in an evenhanded manner, taking broad and equitable views of all questions and avoiding mere technicalities. In the Barrack-pur murder case which arose out of a brutal assault on an Indian doctor by some drunken soldiers resulting in his death, His Lordship's decision, given in the very first Criminal Session over which he presided shortly after assuming office, made his reputation as a fair and impartial judge. In sitting on the Criminal Revisional or Appellate Bench he also maintained this reputation. In civil cases, too, he preserved this attitude of judicial impartiality and all that he used to look to were the merits of the cases and never to the race or creed of the parties or matters of a like nature. As an instance, we would refer to one of His Lordship's earliest decisions, *Choutmull Doogar v. The Rivers Steam Navigation Company*, 1 C. W. N. 201: s. c. I. L. R. 24 Cal. 786, which was upheld on appeal to the Privy Council; see *The Rivers Steam Navigation Company v. Choutmull Doogar*, 3 C. W. N. 145: s. c. I. L. R. 26 Cal. 398. The same feature is also evident in one of his latest decisions, *Nemi Chand v. C. W. Wallace*, 11 C. W. N. 537: s. c. I. L. R. 34 Cal. 495.

His Lordship's judgments in civil cases, specially in those coming up before him on appeal from the Original Side of the High Court, showed a remarkable grasp of the facts and a rare insight into the essential features of the cases, which found expression in such felicitous language as is rarely to be met with in the pages of our law reports. The breadth of view which has been a marked feature of His Lordship's judgments appears in even clearer light in some of His Lordship's judgments in criminal cases. We need only a few of them, *M. An Bibi v. The Crown*, 6 C. W. N. 380; *The Emperor v. Jasha Bawa*, 1 C.

W. N. 904; *Hari Bhumali v. The Emperor*, 9 C. W. N. 974; *Begu Singh v. The Emperor*, 11 C. W. N. 561: s. c. I. L. R. 34 Cal. 551.

Regarding his freedom from executive bias we may refer to his attitude in the Rungpur Special Constables case when his observations from the Bench led to the withdrawal of the prosecution. His decision in the Jamalpur case, *Brojendra Kisore Roy Chaudhury v. Clarke*, on which we have recently commented, has also enhanced his reputation of being a fair-minded Judge. On the whole we can say at the close of his career that he has discharged the duties of his high office with becoming dignity and fairness. In his retirement His Lordship carries with him our best wishes.

### Notes of Cases.

#### " CALCUTTA HIGH COURT.

##### Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

**CRIMINAL REVISIONAL JURISDICTION.** Before CASPERSZ and RYVES, JJ. CRIMINAL REVISION No. 1443 OF 1908. ABDUL KADIR AND OTHERS, Petitioners *v.* THE EMPEROR, at the prosecution of BIMALA CHARAN MUKHERJEE. 11th February 1909.

*Sanction for one offence—Conviction for another offence—Legality of the conviction.*

One Bimala Charan Mukherjee, Sub-Inspector of Police, with a posse of police-officers went to search the house of the Petitioners. While the Police was searching an altercation arose in the course of which, it was alleged, the Petitioner, Abdul Kadir, assaulted the police-officers and the other Petitioners helped him. The Sub-Inspector made a complaint charging the Petitioners under sec. 353, I. P. C., and sanction was obtained for prosecution with respect to that offence. But the trying Magistrate altered the charge into one under secs. 186 and 225B and convicted the Petitioners and sentenced the Petitioner, Abdul Kadir, to one month's rigorous imprisonment and a fine of Rs. 300, under secs. 186 and 225B, I. P. C., respectively, and his accomplices were found guilty under sec. 225B and sentenced to 2 months' rigorous imprisonment. On appeal the conviction and sentences were upheld. The Petitioners thereupon moved the High Court and obtained the rule. The principal point of law raised was that the Magistrate had no jurisdiction to try the Petitioners for offences under secs. 186 and 225B as there was no sanction for prosecution for those offences.

Their Lordships observed:—

"On the first part of the rule we entertain no doubt that the proceedings were initiated in respect

of certain facts which disclosed offences punishable under secs. 186 and 225B of the Code, though the police-officer thought that sec. 353 was the more appropriate section and in consequence sanction was obtained for a prosecution with reference to the graver sec. 353, I. P. C. The Magistrate, however, thought that secs. 186 and 225B, I. P. C., covered the facts as disclosed by the evidence. It has been urged by the learned vakils for the Petitioners that the conviction and sentence are bad as no sanction to prosecute for the specific offence under sec. 186, I. P. C., had been obtained. We however cannot accept that contention. Sec. 195 of the Cr. P. C. says that no Court shall take cognizance of certain offences except with the previous sanction, or on the complaint of the public servant concerned, or of some public servant to whom he is subordinate. As we have already indicated there was a distinct complaint of facts constituting an offence punishable under sec. 186. We accordingly discharge the first part of this rule."

Their Lordships then on a consideration of the circumstances reduced the sentence.

*Babu Sarat Chandra Basak* for the Petitioners.

*Mr. Orr, Deputy Legal Remembrancer*, for the Crown.

B. C.

**CIVIL APPELLATE JURISDICTION.** Before BRETT and FLETCHER, JJ. APPEAL FROM APPELLATE DECREE No. 1788 OF 1907. JOGENDRA CHANDRA SAHA COWDHURY, Plaintiff, Appellant *v.* SRISH CHANDRA SAHA CHOWDHURI AND OTHERS, Defendants, Respondents. 17th February 1909.

*Partition, suit for, maintainability—Joint possession of other property with Defendants and other persons, if bars suit.*

The appeal arose out of a suit for partition. The Plaintiff claimed that certain lands held by him and the Defendants in their entirety should be divided amongst them. The Defendants said that they and the Plaintiff held some other pieces of land jointly with some other parties and they contended that, in consequence of that fact and the fact that the Plaintiff had not included those other lands in his application for partition, the suit must fail. Both the Lower Courts accepted that contention and dismissed the suit.

*Held*—That the suit was maintainable. The Plaintiff could not be compelled to include in the suit lands held by him jointly with the Defendants and other persons.

*Babu Harendra Narayan Mitter* for the Appellant.

*Babus Dwarka Nath Chuckerbutty and Tarak Chunder Chuckerbutty* for the Respondents.

A. T. M.

*Appeal allowed.*

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#### REPORTS (See Index.)

SIR FRANCIS MACLEAN WAS PRESENTED WITH addresses by the Vakils and Attorneys of the Calcutta High Court on Thursday, the 11th instant, when the retiring Chief Justice took leave of the Court over which he had presided for nearly twelve years and a half. His Lordship left for home the same evening.

MR. JUSTICE HARRINGTON HAS BEEN APPOINTED TO officiate as Chief Justice of the Calcutta High Court until such time as Sir Lawrence Jenkins, Kt., K. C. I. B., whose appointment as Chief Justice has been approved by His Majesty, should arrive and enter upon the discharge of the duties of that office.

WE BELIEVE THAT MR. JUSTICE RICHARDSON, who has been officiating for some time as a Judge of the High Court and Mr. Vincent who has been appointed recently to officiate, will both continue to act as Judges in the places of Mr. Justice Brett and Mr. Justice Holmwood who are going on leave towards the end of this month.

IN CONNECTION WITH THE TRIALS WHICH ARE to commence from date under the Criminal Law Amendment Act of 1908, a question arose as to whether vakils have the right of audience before the special tribunal of three Judges of the High Court as constituted under the Act. The question was argued on Saturday last before a special bench consisting of the Officiating Chief Justice, Mr. Justice Brett, Mr. Justice Stephen, Mr. Justice Mookerjee, Mr. Justice Caspersz, Mr. Justice Fletcher and Mr. Justice Carnduff. It was decided by the majority that the vakils have no right of audience.

THE CONSTITUTION OF THE SPECIAL TRIBUNAL which we believe was settled by Sir Francis Maclean before he left, will show at once how the Appellate Side of the Court is weakened by it. Composed as it is of the Officiating Chief Justice, Mr. Justice Mookerjee and Mr. Justice Carnduff, it is a particularly strong Bench. But the taking away of two of the most senior Judges from the Appellate Side will surely make the ordinary business on that side suffer. As trials under the new Act are to be held without a jury it is very desirable that Judges of experience should sit on it. Our complaint is that when such additional burdens are being thrown on the High Court, it should be strengthened substantially and numerically.

SIR FRANCIS MACLEAN IN TAKING FINAL LEAVE of the Court very justly complained of the constant changes in the personnel of the Court that have taken place during the last ten years. His Lordship said:—

It would surprise some of you to hear that during that period I have seen no less than 34 Judges on the Bench to say nothing of some five or six who were temporarily acting. This frequent changing of Judges is not, to my mind, a good thing either for the Court or for the public; for it means that when a Judge has been only a few years on the Bench and the experience he thus gains makes him a more useful public servant he goes and a new and very often an untried man has to be brought in his place.

WHEN COMPLAINING OF THESE RAPID CHANGES Sir Francis Maclean had surely in his mind the new rule for the compulsory retirement of all Judges at sixty. So far as this rule applies

to members of the Indian Civil Service, it is no doubt a very wholesome rule. After a long term of service in India, most of the Civilian Judges do not care to work up to or beyond the sixtieth year. For instance, Mr. Justice Taylor, Mr. Justice Geidt, Mr. Justice Pargiter all retired much before their full term. Civilian Judges can afford to do so because they earn a handsome pension as members of the Indian Civil Service. But we have pointed out before how the 60 years rule has proved an obstacle to the recruitment of judges from the professional classes. To be entitled to pension they must be on the Bench on their 48th birthday or before. If they are 49 they cannot earn a pension and out of respect for the Bench on which they have sat as Judges, they cannot also practise before the Court. We fail to understand why the sixty years rule should not be made to vary in such cases at the discretion of the Secretary of State, at the conferring of an appointment on a barrister or a vakil. If this is done, the evil of constant changes on the Bench may, to a great extent, be met.

THE OBSERVATIONS OF THE CHIEF JUSTICE ON THE eve of his retirement regarding the present state of affairs on the Appellate Side of the High Court deserve the serious attention of Government. The falling off of disposals on the Appellate Side is partly to be attributed to the withdrawal of an additional judge sanctioned some time ago and also to the frequent short-time appointment of Judges. The formation of special tribunals, if not supplemented at once by the appointment of a 15th Judge, is sure to make things on the Appellate Side go from bad to worse. Referring to the Appellate Side Sir Francis Maclean said :

There has been a somewhat marked falling off of disposals during the last two or three years. There can be no doubt but that a permanent 15th Judge is required and I have every hope that in a short time he may be given to the Court. With such additional Judge the arrears on the Appellate Side if grappled with in a determined spirit by the Judges ought soon to disappear. It is impossible to predicate what effect the constitution of Special Benches to try special cases under the recent Act will have upon the ordinary work of the Court, but it is obvious that if the Court has to try many such cases it will be a very serious matter for the ordinary litigant. Again the Criminal Appellate and Revision work is much heavier than it used to be.

IN THE CASE OF *Subal Ram Dutt v. Jagadanuda Masumdar*, reported at p. 403 of the last issue, their Lordships, Sharfuddin and Coxe, JJ., held that the High Court could not, under sec. 25 of the Provincial Small Cause Courts Act, interfere with the order of a Court of Small Causes returning a plaint under sec. 23 of the Act. We are afraid that the restricted construction placed upon sec. 25 by their Lordships may lead to considerable hardship in many cases. Sec. 25 was enacted for the express

purpose of giving larger powers of revision to the High Court over the Courts of Small Causes than were possessed by the High Court under sec. 622 of the old Civil Procedure Code. If the High Court cannot interfere with an improper order of the Small Cause Court, passed under sec. 23, the result will be that any error committed by that Court in the exercise of its discretion under sec. 23 will remain unrectified. It should be remembered in this connection that many of the suits in the Small Cause Court involve questions of title to immoveable property and the Small Cause Court ought not to be placed beyond the power of revision by the High Court in regard to orders under sec. 23.

IN THE CASE OF *Poona v. Ramji*, I. L. R. 21 Bom. 250, Farran, C. J., who delivered the judgment, observed that the Legislature used the widest words in framing sec. 25 and intended to confer the most ample discretion on the High Court. Of course, if the High Court thinks that the Small Cause Court exercised a proper discretion in returning a plaint under sec. 23, it may refuse to interfere under sec. 25. But in the case reported their Lordships held that the order of the Small Cause Court returning the plaint was not a proper order and still they refused to interfere on the ground that the order of the Small Cause Court did not fall within the purview of sec. 25, because such an order could not be regarded as one passed in a case decided by that Court. In one sense it may be said that the Small Cause Court decided the suit when it refused to entertain the plaint. As sec. 25 is the only section in the Act under which the orders and decrees of the Small Cause Courts are made subject to the supervision of a higher tribunal, the word "decided" should receive a liberal construction. But even if their Lordships were fettered by the language of sec. 25, they could have interfered under the Charter, especially when they considered that the order of the Small Cause Court was not proper. As Mr. Justice Woodroffe observed in the case of *Lekhraj Ram v. Debi Prosad*, 12 C. W. N. 678, the power of the High Court under the Charter is very wide and there is no form of judicial injustice which the High Court cannot reach in the exercise of its powers under the Charter.

#### CURRENT INDIAN CASES.

*PARTAP v. THE DELHI AND LONDON BANK*, I. L. R. 30 All. 393. *Civil Procedure Code*, sec. 503.

Sec. 503, C. P. C., empowers a Court to appoint a Receiver in a case where two decrees are attached by a decree-holder—the Receiver may realise the amount of the attached decrees.

KALLU v. FAITAZ, I. L. R. 30 All. 394. *Hindu Law—Widow's estate.*

A decree against a Hindu widow for money borrowed on her personal security binds the widow's estate only even if the original debt was for legal necessity.

COMMISSIONER OF MIRZAPUR v. DAWAN SINGH, I. L. R. 30 All. 400. *Limitation Act, Sch. II, Art. 116.*

Art. 116, Sch. II of the Limitation Act applies to a suit based upon a covenant in a mortgage deed that if there be any loss in the recovery of the amount due or in the recovery of possession as agreed to, the mortgagee would have power to realise the amount secured by the bond.

MUL KUNWAR v. CHATTAR SINGH, I. L. R. 30 All. 492. *Limitation Act, Sch. II, Arts. 97, 116.*

Art. 116 and not Art. 97 of Sch. II of the Limitation Act applies to a suit by a purchaser for a refund of proportionate part of the consideration money and damages when a part of the property was not obtained possession of by him.

HARPAL v. LEKHRAJ, I. L. R. 30 All. 406. *Primogeniture—Will.*

Will by the owner of an impartible estate to which the rule of primogeniture applied by which the widow got the estate absolutely. Compromise by the next reversioner with the widow that the widow should be "guddinishin" during her life and that after her death Plaintiff or any representative should be absolute owner. *Held*, that upon the widow's death the estate would descend according to the rule of primogeniture.

RAM v. GAYA, I. L. R. 30 All. 422. *Limitation Act, sec. 19.*

An acknowledgment of debt by a guardian for the benefit of the minor gives a fresh start for the computation of limitation.

CHEDALAL v. GOVINDO, I. L. R. 30 All. 455. *Will, construction of.*

Where a testator bequeathed his "money" to a legatee, *held*, upon a construction of the Will, that the whole of the personal estate passed.

RAMRATAN v. LACHMAN, I. L. R. 30 All. 460. *Joint family—Debt.*

A mortgagee cannot upon the mortgage by one of the members of a joint family proceed against the interest of another member of the family where the mortgagor created the mortgage to pay off a debt to the latter.

UMMI v. KESHO, I. L. R. 30 All. 462. *Guardian—Sale—Mahomedan Law.*

Sale by mother and wife of a lunatic for the latter's benefit cannot be impeached.

GENDOO v. NIHAL, I. L. R. 30 All. 464. *Civil Procedure Code, secs. 244, 258.*

A suit by a judgment-debtor to recover payments not certified under sec. 258, C. P. C., is not barred by sec. 244.

GHASETEY v. GOBIND, I. L. R. 30 All. 467. *Pre-emption—Lis pendens.*

The doctrine of *lis pendens* applied when during the pendency of a suit for pre-emption the vendee sold to another although the latter was made a party but no relief was asked against him.

DWARKA v. AKHOY, I. L. R. 30 All. 470. *Res judicata.*

A decision in a suit for annuity for a previous year was held to operate as *res judicata* in a subsequent suit for a later period. The fact that the first decision was by a Revenue Court did not make any difference when the second suit was in a Civil Court.

BITHAL v. JAMNA, I. L. R. 30 All. 476. *Right of suit or application—Refund.*

Where a decree was set aside and then another decree for a smaller amount was obtained, a suit or an application is maintainable to get a refund of the difference.

UMAN v. JURBANDHAN. *Civil Procedure Code sec. 562—Appeal.*

An appeal lies against an order of remand under sec. 562 although that order has been complied with by the first Court.

GREY v. HAZARI, I. L. R. 30 All. 486. *Appeal—Official Assignee—Sale proceeds.*

No appeal lies against an order refusing the Official Assignee's application to get the sale proceeds.

RAM v. THE MAHARAJAH OF VIZIANAGRAM, I. L. R. 30 All. 488. *Redemption suit—Landlord.*

A landlord cannot bring a suit to redeem a mortgage created by a tenant at fixed rates when the latter dies without heirs.

RAM v. KALLU, I. L. R. 30 All. 497. *Redemption—Reversioner.*

A reversioner cannot bring a suit for redemption of a mortgage by a Hindu widow during her lifetime.



**MUJIB-ULLA v. UMED**, I. L. R. 30 All.  
*Execution of decree—Striking off, effect of.*

An application to sell property when the execution was "struck off for the present" was considered an application in continuation of the former execution.

**PACHKAURI v. NAND RAI**, I. L. R. 30 All. 505.  
*Arbitration—Reference.*

On the setting aside of an award the Court cannot refer the dispute to arbitration a second time on the same agreement.

**RANKALI v. JAMMA**, I. L. R. 30 All. 508. *Inheritance—Occupancy holding.*

An illegitimate son of a sudra caste can succeed to an occupancy holding.

## Review.

**CODE OF CRIMINAL PROCEDURE** with notes. By *Janaki Nath Paul, B. L., Shastri*, 1908. Published by the Law Publishing Press.

The new edition of the Criminal Procedure Code, revised and brought down to July 1908, is an improvement upon the previous editions of the same issued from this Press. The book does not profess to be an exhaustive commentary on the Code, but only select cases decided by the Chartered High Courts since the Code of 1882 have been incorporated, the important secs. 145, 162-164, 233-235, 298, 337, 364, 423, 435-439, 476, 526 and 537, being more fully dealt with. The text of the Indian Criminal Law Amendment Act very appropriately finds a place in the book. The General Index, however, follows the lines of the indexes of the earlier editions, though it would have undoubtedly gained in usefulness by being made more full. The work will be found useful to criminal practitioners in the mofussil who are unable to procure the more costly annotated editions of the Code.

## Notes of Cases.

### ENGLISH LAW COURTS.

**COURT OF APPEAL.**—*Cooper v. Kendall*. Before the MASTER OF THE ROLLS and LORD JUSTICE BUCKLEY. 22nd January 1909.

*Acknowledgment sufficient to bar limitation.*

Plaintiff sued upon a bill of exchange, dated the 28th January 1901, to recover £200 and also upon an account stated dated the 24th April 1908. Plea, Statute of Limitation; reply, acknowledgment sufficient to bar the operation of said statute. On the 22nd April 1908 Plaintiff demanded payment and on the 24th April Defendant replied. "Your

letter of the 22nd instant; I think I owe your client £210 and 5 shillings but I cannot meet this liability at the moment although I hope to call upon you within 14 days to make a definite proposal for re-payment of that amount from date of loan." Darling, J., dismissed the suit holding that that was not sufficient to take the case out of the statute.

On appeal, the Appellate Court took a different view and reversed the judgment of the Court below. That Court held that there was an unconditional promise to pay. The hope contained in the letter was not inconsistent with a promise to pay. *Lee v. Wilmot*, 1866, L. R. 1 Exch. 364, *Chasemore v. Turner*, L. R. 10 Q. B. 500, *Sidwell v. Masin*, 1857, 2 H. and N. 603, followed. *Tanner v. Smart*, 1827, 6 B. and C. 603 and *Smith v. Thorne*, 18 Q. B. 134, distinguished, as there was no sufficient acknowledgment in these two last cases.

See *Maniam v. Rupchand*, E. R. 33 I. A. 165; s. c. 10 C. W. N. 874, citing L. R. 6 Chancery, p. 822.

*Messrs. Lush, K. C.*, and *Hinde* for the Plaintiff.  
*Mr. Whateley* for the Defendant.

**COURT OF APPEAL.**—*Parrish v. Mexico Electric Tramways, Ltd.* Before the MASTER OF THE ROLLS and BUCKLEY, J. 30th January 1909.

*Company law—Right of shareholders to discovery—Communication with solicitor—Privilege.*

In these appeals from orders in chambers one order which was to the effect that communications between the Company and their legal advisers were privileged, was upheld but as to the second order relating to document the Court of Appeal held that it was too important a point to be decided otherwise than by a Full Court.

*Mr. Lawrence, K. C.*, urged that he had a right to inspect the documents as the litigant, was a shareholder and he was really asking to be allowed to see his own documents and relied upon a decision by Chitty, J., in 1889 in the case of *Goumond v. The Edison Company, Ltd.*

*Mr. Rufus Isaacs, K. C.*, was heard but the Court held the point must be heard by a Full Court.

### PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD MACNAGHTEN.  
LORD ATKINSON.  
LORD COLLINS.  
SIR ARTHUR WILSON.  
1909,  
11, February.

DAYA BHAI TAPIDAS  
v.  
CHUNNI LAL HARGOVAN-  
DAS and another.

*Petition for special leave—Word used in Will—Same word in codicil—Interpretation—Meaning of Gujarati word—No question of public importance.*

*Mr. DeGruyther* for the Petitioner.—The facts giving rise to the appeal can be very shortly stated. There was a man, called Damodardas Tapidas, who executed a Will, and in that Will he gave his widow authority to adopt in these terms: "Should I, after my death, have no male issue of my loins, and should I in my lifetime have not adopted anyone as my son, then my first wife Harkor, and should she be not alive then my second wife Ambalasmī, shall after my death adopt any boy out of the descendants of my father (ancestors) and if amongst them there be no boy who can according to the shastras be adopted then out of my caste by performing the ceremony prescribed in the shastras." With reference to the words "out of the descendants of my father" in the Gujarati language the original Gujarati words are "Mara bapika vanshmāthi," and the question is what those words really mean. The official translator of the Court translated the document as "out of the descendants of my father" and then in a bracket he added the word "ancestors." It appears that the boy who was adopted was not from among the descendants of the father but was descended from a very remote ancestor, and as the right to the property rests on the adoption the present Appellant says that this is an adoption outside the authority granted to the widow. A certain amount of evidence was taken as to what these words meant in Gujarati. We examined various learned pleaders and Pundits from various colleges, and they said that the word could not mean "ancestors," it must be limited to the term "father." On the other hand there were two pleaders examined on behalf of the Respondents and they said that the true literal translation certainly was "from amongst my father's descendants;" but they said it could possibly have a wider construction so as to include descendants from ancestors. The case was tried by Mr. Justice Beaman who came to the conclusion that having regard to the circumstances of the family, admitting that this was the literal construction, the wider construction might be adopted because he says the circumstances of the family were these, that there was only one person who at the time of the Will was a descendant of the father who could be adopted, and he said that if the testator had meant this particular individual he would have named the individual instead of giving a sort of general power of adoption. Then the case went to the High Court on the Appellate side and there the case was heard by Chief Justice Jenkins, Mr. Justice Chandavarkar and Mr. Justice Heaton. I mention this for the purpose of shewing that as a matter of fact there was a Judge who seemed to know the language, Mr. Justice Chandavarkar, on the Bench. They came to the conclusion, for much the same reasons as were given by Mr. Justice Beaman, that the intention of the testator was to allow the wider

selection in regard to the adopted son. From the judgment the present appeal has been brought.

I quite feel the difficulty of asking your Lordships to sit purely and simply as judges on a question of the translation of a document. If there were nothing more in the case I should not trouble your Lordships with it, but there is another point and it is this, we have lodged an affidavit from the Professor of Gujarati in the University of London, an examiner of scholars in Gujarati. His affidavit is to the effect that the matter is beyond dispute. He says: "I have read a certified copy in the Gujarati language of the Will and codicil of the testator Damodardas Tapidas which are in question in the above suit. The literal meaning of the words 'Mara bapika vanshmāthi' used in the said Will is (mathi) 'from among' (mara) 'my' (bapika) 'fathers' (vansh) 'descendants'." The word 'bap' is derived from a Sanscrit verb meaning the spreading of seed and the expression 'a man's bap' signifies the person from whose seed he is sprung that is to say his father. The word 'bapika' is always used in this sense. It is a substantive of the genitive case, the nominative being bap. Substantives in Gujarati are often used as adjectives. Coupled with the word 'vansh,' "the expression can only mean" of the descendants. It could not include ascendants. When the father and remoter paternal ancestors are intended the words used are 'bap—dada'. The expression "Mara Bap Dadani Milkat" would signify 'the property of my father, grandfather and ancestors' in an ascending line. The ordinary and usual meaning of the word 'vansh' is descendants." Everybody is agreed about that. The question is whether the word 'vansh' would have a secondary meaning having regard to the circumstances in which the man was placed, that is, whether for the purpose of construing his Will you are entitled to go into collateral matter. He goes on: "I am informed that the words in question have been translated by the official translator, 'out of the descendants of my father (ancestors)' I say that the word 'ancestors' is not a translation of any of the original words and is entirely imaginary and misleading because if the testator intended ancestors he would have used the expression 'bap dadani' and not 'bapika.' When the word 'bap' is used in connection with a man's family or descendants it implies that the 'bap' or father is the root of descent. None of the three Gujarati words in question can be translated 'ancestors' or 'descendants of ancestors'. The Gujarati language is simple and direct in its forms and expressions and does not admit of the amplification and variation attempted in this case whereby the simple phrase 'bapika vanshmāthi,' 'descendants of the father,' has been rendered 'paternal agnates' and 'ancestral vansha' or similar periphrases. I have also read a certified copy of a codicil to the Will of the said testator. In such codicil the expression 'bapiki' is

used three times. It is the same word as *bapika* and they are often used interchangeably. In each case the expression in the codicil can have no other meaning than 'of the father'. Here may be raised the second question of law because we say that if the same word is used in two different parts of a Will there is no room for other than placing the same construction, and that we are bound to do so by the provisions of the Indian Succession Act 10 of 1865, sec. 73.

[SIR ARTHUR WILSON.—Does that Act apply to this Will?]

*Mr. DeGruyther*.—Yes. "If the same words occur in different parts of the same Will they must be taken to have been used everywhere in the same sense unless there appears an intention to the contrary."

[LORD MACNAGHTEN.—This was not in different parts of the same Will, was it? One was in a codicil and the other in a Will.]

*Mr. DeGruyther*.—They have been admitted to probate as one testamentary instrument.

[LORD MACNAGHTEN.—Of course they would be.]

*Mr. DeGruyther*.—There is no doubt the word is used by this man in the codicil in three different places in the sense of "limited to the father." The High Court said "this is a legitimate inference, but they say the section provides, unless there is an intention to the contrary, and we consider the intention to the contrary is sufficiently manifested by the fact that if we construe the Will as the present Appellant desires to construe it it limits the selection of the adopted son to one single individual who alone was alive at the time the Will was made."

[LORD ATKINSON.—How long was the Will made before the death of this testator?]

*Mr. DeGruyther*.—The testator died on the 5th July, 1899, his Will was dated the 8th September, 1895, *non constat* that other persons who would be capable of being adopted could not have come into existence in the interval between his Will and the death. I have placed the matter entirely before your Lordships. The Courts in India refused us leave on the ground that there is no substantial question of law involved. They say this is not a pure question of construction of the document. They say "we have considered the document by reference to the facts and circumstances existing at the death of the testator, and we are convinced what the testator really meant was that any person from amongst his paternal agnates should be allowed to be adopted."

[SIR ARTHUR WILSON.—How does the section of the Succession Act apply?]

*Mr. DeGruyther*.—I did not look up the point, but the High Court in their judgment in express term treats it as applying.

[SIR ARTHUR WILSON.—Does the Hindu Wills Act apply to the section?]

*Mr. DeGruyther*.—Yes, without doubt. The

only question is, the Hindu Wills Act is of limited operation, but it applies to all the Presidency Towns. I feel the difficulty about the question of translation, but still I submit to your Lordships that this is a proper case in which the matter ought to be decided definitely by your Lordships.

[LORD MACNAGHTEN.—I do not see how you can read this affidavit at all. You cannot read affidavits of various professors of all the Universities of the world. I dare say this is a very learned gentleman.]

*Mr. DeGruyther*.—The fact remains that the literal meaning of the words is conceded to be what we say it is. Then it is alleged that there is a secondary meaning, the meaning of 'vansh' which would include paternal agnates, and then there is the further question that the High Court really placed the secondary meaning upon the words, because they assert that the testator, if he had meant to indicate a particular individual who would fulfil the necessary qualifications, would have named him by name instead of in general terms. Then there is the other question where the word is used in the codicil.

[LORD MACNAGHTEN.—"If the same words appear in different parts of the same Will"—that must mean in the same instrument.]

*Mr. DeGruyther*.—Drawn up by the same person. I understand your Lordship to say it would not apply where one word was used in a codicil and one in a Will.

[LORD MACNAGHTEN.—No, not according to this.]

[LORD ATKINSON.—The whole reason of the thing points to this that it is the same document supposed to be written at the same time.]

*Mr. DeGruyther*.—I cannot place the present application any higher than I have done. The question is whether your Lordships would allow the reconsideration of this matter, whether your Lordships would feel yourselves bound by the view taken by the Courts in India as to whether this is a literal or expansive or secondary meaning. I have pointed out to your Lordships that Mr. Justice Chandavarkar was asked to sit upon this case and he came to the conclusion that they did have a secondary meaning.

[SIR ARTHUR WILSON.—Is he a Gujarati speaking gentleman?]

*Mr. DeGruyther*.—From his judgment apparently he knows the language well. He refers to Gujarati and to Sanscrit.

[LORD MACNAGHTEN.—You have no opponent, I suppose?]

*Mr. Raymond Asquith*.—Yes, my Lords, I appear to oppose the petition. I submit that there is no question of law or of any public interest or of any importance of any sort except to the parties and possibly to students of the Gujarati language. This is a pure question of fact, a question of the meaning of three words in this Indian dialect, and that question of fact has been decided by two Courts

in Bombay, one of which had the assistance of a Judge in whose language the Will was written, and speaking with all deference to your Lordships' knowledge of the Gujarati language I submit you would be very chary in disturbing or rejecting the opinion of a Gujarati Judge upon the meaning of his own language. I therefore ask your Lordships to dismiss the petition with costs.

LORD MACNAGHTEN.—Their Lordships are unable to advise His Majesty to grant special leave. You are entitled to your costs.

J. H. W. A

*Petition refused with costs.*

## CALCUTTA HIGH COURT.

### Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and RYVES, JJ. CRIMINAL REVISION No. 1427 OF 1908. CHAND MAGHI AND ORS., Petitioners v. R. S. ASHCROFT, Opposite Party. 9th February 1909.

*Penal Code, sec. 406—Joint trial of several persons under—Illegality—Absence of finding of dishonest intention.*

On the 22nd July 1908, the complainant, R. S. Ashcroft, manager of a Coal Company, informed the Sub-Inspector of Police by a letter that the Petitioners who were coolies in his colliery had decamped with various implements with which they were supplied for work in the colliery. The Sub-Inspector on investigation reported the case to be of a civil nature, whereupon the complainant filed a complaint before the Sub-divisional Magistrate who issued warrants against the Petitioners. The Petitioners were then jointly tried for an offence under sec. 406, I. P. C., convicted and sentenced, each, to 3 months' rigorous imprisonment. The sentence and conviction were upheld on appeal by the Additional Sessions Judge. The Petitioners moved the High Court and obtained this rule.

The rule was issued on two grounds (1) that the joint trial of the five Petitioners for separate acts of breach of trust was illegal, and (2) that there was no finding of any dishonest intention.

On the question of joint trial the Additional Sessions Judge observed:—"The tools were given the same day by the same owner. The men (i.e., the Petitioners) have decamped. No objection was made to a joint trial, nor do I see how the accused have been prejudiced."

Their Lordships observed:—

"It is clear from the judgment of the lower Court that the essential element in criminal breach of trust has not been found, namely, the wrongful conversion of the workmen's tools to their own use. They may be detained by them either under a claim of right or some other reason. . . .

Again a charge under sec. 406 cannot be combined with similar charges against a number of persons each of whom is alleged to have misappropriated the tools in his possession. Each case would have to be tried separately on its own merits. It is quite possible that the evidence and defence would be quite different in each case. For these reasons the rule must be made absolute."

Their Lordships did not order a retrial in view of the fact that the Petitioners had already served out a month or so of their sentences.

*Babus Atulya Charan Bose and Srish Chandra Bose for the Petitioners.*

CIVIL APPELLATE JURISDICTION. Before SHARFUDDIN and COXE, JJ. APPEAL FROM ORIGINAL DECREE No. 534 OF 1907. MOHIMA CHUNDER MOULIK AND ANOTHER, Defendants, Appellants v. SHARAJEE BALA GUPTA, Plaintiff, Respondent. 12th February 1908.

*Probate and Administration Act (V of 1881), sec. 23—Gifts for maintenance—Grant of whole and not of portion.*

One Mohim Chunder executed a Will in 1877 in which he appointed certain gentlemen executors. They took out probate in 1881. Under the Will the property of the testator was left to two persons, named Jatadhari Sen and Matangini Gupta. After Jatadhari's death he was succeeded by his widow who took out probate of a Will executed by him. The Appellants applied for letters of administration to the estate of Mohim Chandra under sec. 23 of the Probate and Administration Act. Their case was that the gifts to Jatadhari Sen and Matangini under the Will were gifts for life only and that after the death of the two legatees there was an intestacy. They obtained letters of administration under sec. 23. Thereafter the widow of Jatadhari applied under sec. 50 of the Act to have the grant of the letters revoked. The Court below granted that application and revoked the letters of administration.

*Held*—That the letters of administration could not be granted inasmuch as under the Will of Mohim the gift to Jatadhari was an absolute gift and not a gift for life. Gifts for maintenance are very frequently heritable and not necessarily a gift for life only. There was no intestacy as such would justify the grant of letters of administration under sec. 23.

Sec. 23 of the Probate Act contemplates the grant of administration of the whole estate, and not of a portion. Exceptions may, under certain circumstances, be made under sec. 42.

*Ram Chand Seal's case (I. L. R. 5 Cal. 2) referred to.*

*Babus Mokini Mohun Chuckerbutty and Amullya Charan Mitra for the Appellants.*

*Babus Surendra Chander Sen, Priya Sankar Mojumdar and Bankim Chunder Sen for the Respondent.*

A. T. M.

*Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before CARNDUFF, J. APPEAL FROM APPELLATE DECREE NO. 1587 OF 1907. BEPIN BEHARY SEN v. THE CHAIRMAN OF SANTIPUR MUNICIPALITY. Heard, 11th February 1909. Judgment, 15th February 1909.

*Municipality, right of, to levy tax—Corporation, constitution of—Small Cause Courts Act (IX of 1887), Art 35, cl. (j).*

The Municipality of Santipur was established in the District of Nadia in 1865 with a body of Commissioners. In the second schedule to the Bengal Municipal Act of 1884 it appears as being a Municipality in which the appointment of the Chairman rests with the Local Government and that of two-thirds of the Commissioners with the ratepayers. By para. 8 of a Resolution, dated the 29th August 1903, and issued under sec. 65 of the Act, the Local Government suspended the Commissioners from office for a period of one year, to expire on the 2nd September 1904. By that order the then Commissioners vacated their offices as such by virtue of cl. (a) of sec. 66 of the Act, and, by a further order passed under cl. (b) of the same section, the Sub-divisional Officer of Ranaghat was appointed as the person by whom "all the powers and duties of the Commissioners during the period of supersession should be exercised and performed." During that period the Sub-divisional Officer, proceeding under sec. 9 (e), recommended that the number of the Commissioners should be reduced from 25 to 9, and that recommendation was accepted by the Local Government. At the same time a Resolution, dated the 31st August 1904, was issued directing, under the last paragraph of sec. 66, that the Municipality should be entered in both the first and the second schedules to the Act. The Corporation was then re-established with a body of only 9 Commissioners, and thereafter the body so reconstituted imposed certain new rates, to which the Appellant, *inter alia*, was assessed. He at first refused to pay; but, under pressure of the issue of a distress warrant, did eventually pay and bring a suit for the recovery of the amount levied and damages. The suit was tried by the Munsif of Ranaghat in the exercise of his ordinary jurisdiction and was dismissed; an appeal preferred to the Subordinate Judge was dismissed and a second appeal was preferred to the High Court.

*Held*—That the suit fell under Art. 35 (j) of the second schedule of the Provincial Small Cause Courts Act as being a suit for compensation for illegal distress.

As the Corporation was not properly constituted on its revival on the 2nd September 1904, there was no valid authority for the levy of any new rates.

*Babus Mahendra Nath Roy and Krishna Prosad Sarbadhikary for the Appellant.*

*Babus Nilmadhub Bose and Sarat Chunder Khan for the Respondent.*

A. T. M.

*Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before SHARFUD-DIN and COME, JJ. APPEAL FROM ORIGINAL ORDER NO. 540 OF 1907. KAILASH CHANDRA PAL, Petitioner, Appellant v. HARI MOHAN DAS AND OTHERS, Opposite Party, Respondents. Heard, 18th, 22nd and 23rd February 1909. Judgment, 23rd February 1909.

*Attachment—Homestead—Transfer, usage of—Nazarana—Landlord, consent of—Civil Procedure Code (Act XIV of 1882), sec. 244—Transfer of Property Act IV of 1882, sec. 108, cl. (j).*

This was an application under sec. 244 of the former Code in which the judgment-debtor pleaded *inter alia* that a certain property, which was a homestead in the town of Comilla, which the decree-holders sought to attach in execution of their decree was not liable to attachment. The Court below held that the property was subject to attachment and disallowed the objection on grounds, firstly, that the judgment-debtor was not entitled to deny that the holding was transferable by usage and, secondly, that the holding was transferable under the Transfer of Property Act. The parties went to trial on the assumption that the holding had been in existence for upwards of 46 years. The judgment-debtor appealed to the High Court.

*Held*—When a landlord receives *nazarana* as a condition of recognising a transfer, the acceptance of that *nazarana* shows that he consents to that transfer. Any number of instances of sales with the consent of the landlord cannot prove a usage of sale without consent.

Observation in *Moharaja Radha Manickya v. Srimati Ananda Pria* (8 C. W. N. 235) not followed.

That sec. 108, cl. (j) of the Transfer of Property Act did not apply.

That the land was not therefore liable to attachment.

*Babu Harendra Narayan Mitter for the Appellant.*

*Babu Upendra Lal Roy for the Respondents.*

A. T. M.

*Appeal allowed.*

# THE Calcutta Weekly Notes.

Vol. XIII.]

MONDAY, MARCH 22, 1909.

[No. 19]

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prove that they were not negligent in running down other people.

WITH REFERENCE TO REPRESENTATIONS MADE IN connection with the new Rules of Procedure in appeals to His Majesty in Council, which were approved by His Majesty on the 21st December, 1908, that the attendance of two Counsel on the delivery of judgment is generally unnecessary and the cause of needless expense to the party who is mulcted in costs, the Registrar of the Privy Council has issued the following note:—

After considering the question in all its bearings, I have come to the conclusion that my proper course is to warn Solicitors that in future I must throw on the party bringing in a Bill for taxation the onus of satisfying me that the attendance of two Counsel on the occasion of the judgment is necessary or, at any rate, expedient in the interests of justice. In the majority of cases, the presence of a junior Counsel, with a fee of five guineas, will, I think, suffice, more especially as, according to their well-known practice, their Lordships refuse to hear any argument in the matter of costs. I recognise that in some special circumstances the attendance of Leading Counsel also might be desirable, e.g.:

Cases in which their Lordships previously intimated that they desired the attendance of Counsel at the delivery of judgment; and

Where either party gives the other notice that he proposes to raise some question of substance on the delivery of judgment.

I desire further to take this opportunity of intimating that I think the practice of the House of Lords and the High Court should be followed in regard to the paying of Counsel's fees, and that in the future I must disallow on taxation attendances on Counsel for the purpose of paying their fees, but I propose, in accordance with the above practice, to allow attendances for marking refreshers.

IN *Smith v. Thomas*, 62 S. E. 772 (N. C.), NOTED in the February number of the *Harvard Law Review*, the Defendant instituted criminal proceedings against the Plaintiff, who pleaded guilty and was convicted but the judgment was reversed on appeal. The Plaintiff then brought an action for malicious prosecution and it was held that the conviction was conclusive evidence of probable cause for instituting criminal proceedings. The Review adds the following interesting note as to whether conviction subsequently reversed is sufficient to bar a suit for malicious prosecution.

In an action for malicious prosecution the plaintiff must prove that there was no probable cause for instituting the

WE INVITE ATTENTION TO THE REPORT OF THE judgment of the Appeal Court in *L. O. Clarke v. Brajendra Kishore Roy Chowdhuri*, at p. 458 of this number. Our comments on this very important judgment appeared shortly after it was delivered and will be found at p. lxix (69) of the current volume.

LORD JUSTICE VAUGHAN WILLIAMS OBSERVED in the course of the hearing of an appeal from a case in which damages had been awarded against a motorist for having collided with a bicycle, that when any collision occurred between a motor car and any other vehicle, the burden of proof for disproving negligence should be on the motorist. Considering the speed at which motor cars are often driven and also the belief amongst motorists generally that anybody within the sound of their hooters ought to clear out of their way, the presumption of negligence that the learned Lord Justice desires to fasten on them in cases of accidents seems quite reasonable. The sounding of the hooter in quick succession from behind from a car tearing down the road often helps in precipitating accidents than otherwise. Pedestrians and drivers of horse and other vehicles at the sound of a rapidly approaching road-hog swerve from their usual course and seek in vain a line of safety in some other less secure part of the road. In the new Explosives Act, passed by the Government of India, it has been enacted that the possession of explosives will give rise to the presumption of guilt and the burden of proof will be on the possessor to prove lawful purpose. The learned Lord Justice does not proceed so far but surely His Lordship is justified in calling upon those who let loose a motor car on a public thoroughfare to

criminal proceedings. *Gurley v. Tomkins*, 17 Colo. 437. Many courts hold that a judgment of conviction, although subsequently reversed, is *prima facie* evidence of probable cause. *Nicholson v. Sternberg*, 61 N. Y. App. Div. 51. But the weight of authority supports the principal case in holding that a conviction in the original court is conclusive evidence of probable cause. *Parker v. Huntington*, 73 Mass. 36. There is some authority for the rule that such conviction is not evidence of probable cause when for any reason it carries no probative force. *Nehr v. Dobbs*, 47 Neb. 863. But it is generally considered evidence unless secured by fraud or perjury. *Gilmore v. Martin*, 115 Ill. App. 46; *Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co.*, 120 U. S. 141. Logically, however, the fact of a conviction subsequently reversed should be evidence in such an action only so far as it tends to establish that the defendant had reasonable grounds for instituting the criminal proceedings and an honest belief in the guilt of the accused at the time such proceedings were commenced. For it is upon these facts that the defendant's case depends, not upon the evidence produced at the trial. *Harkrader v. Moore*, 44 Cal. 144.

### THE POWER OF COURTS TO RE-HEAR A COMPLAINT ONCE DISMISSED AND RE-OPEN DISCHARGED CASES.

The Code of Criminal Procedure is an exhaustive Act being the law consolidating and amending the law relating to the Criminal Procedure. By the express addition of a new rule in sec. 439 to the effect that (see cl. 5) "where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed," the law is made clear regarding the exhaustive nature of the remedies provided against erroneous orders of Courts of first instance, for the above provisions implies that no jurisdiction which is not expressly granted can be assumed by any judicial authority. No Courts can, therefore, be said to possess any inherent powers which are not expressly granted. (See the observations of Mr. Justice Pinhey in 31 Mad. 543, 545 to the same effect and those of Mr. Justice Subramania Aiyer in 27 Mad. 175 and also in 29 Mad. 124 in the course of his dissentient judgment.)

The High Courts have often had to decide the question if a Magistrate could re-hear a complaint which he had himself dismissed under sec. 203 of the Criminal Procedure Code, or re-open a case in which he had discharged the accused, without his previous order being set aside by a superior Court. The views held by the several High Courts are not unanimous about the point. The Criminal Procedure Code being exhaustive in itself, and there being no express provision for the exercise of such a power the attempt to justify and legalise the assumption of such powers is made on another basis, *viz.*, that the previous orders of dismissal or discharge in such cases are not judgments in the sense of sec. 369 and as such are liable to review by the Courts which passed the same. It is argued that in sec. 369 the word

'judgment' occurs, and because according to the interpretation placed on the section orders under secs. 203 and 253 are not judgments, Courts are not in any way prohibited from entertaining fresh complaints or from re-opening a case in which the accused is discharged. With all due deference to the learned judges who express that view it is not possible to agree with the same. The word, "judgment" is not defined in the Code. But to interpret it in a way that does not fall in with the import of the sections of Chap. XXVI of the Code, in which sec. 369 occurs, does not seem to be warranted by the intention of the Code to be exhaustive. Because the word, judgment, is not defined, the Courts have discussed and speculated upon other sections of the Code to find out what the word "judgment" may probably mean. But such an attempt does not seem to be authorised or warranted by the Code. Sec. 367 states what a judgment should contain. After stating that the judgment in every trial shall be pronounced in open Court after the termination of the trial in the language of the Court or in some other language which the accused or his pleader understands and that the accused, if in custody, shall be brought up to hear the judgment (see sec. 366), the Code proceeds to state that every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer and shall contain the point or points for determination, the decision thereon and the reasons for the same. From the use of the words 'trial,' 'termination of the trial,' in the language which the accused understands' (sec. 366) and the express rule to the effect that it shall contain the point or points of determination and the decision thereon, it is clear beyond doubt that in all cases in which the accused is served with summons for attendance the orders passed discharging the accused are judgments, so that it cannot be gainsaid that orders under sec. 253 are judgments, and they come within the purview of sec. 369 and as such they cannot be said to be liable to review by the Courts which passed them. In 29 Mad. 124 (F. B.), White, C. J., held a contrary view on the ground that sec. 367 of the Code contained the words "acquittal" and "conviction" only and not "discharge," and on that ground the learned Chief Justice held that orders under sec. 253 do not come within the sense of the word "judgment" in Chap. XXVI. But as Ghose, J., pointed out in his dissentient judgment in 5 C. W. N. 457, it is a too narrow interpretation and it ignores the fact that the first clause of the section clearly provides for cases of discharge under sec. 253.

Reliance is also placed on sec. 403 (Explanation) and it has been held that the principle of *autre fois acquit* does not apply to orders of discharge under sec. 253. This interpretation also, does not seem to be justifiable. For, there is an



express rule in sec. 437 to the effect that the superior Courts mentioned therein alone have the authority to order further inquiry in such cases. Both secs. 403 and 437 ought to be read together and their import grasped. For, otherwise it is not possible to understand the Explanation to sec. 403 or to appreciate the use of sec. 437. The view of the majority of the Judges of the Full Bench in 29 Mad. 124 is severely criticised by their Lordships, Davies, J., and Subramanian Ayer, J., whose views are also shared by Ghose, J., in 5 C. W. N. 457 (F. B.). The point of the criticism is that the assumption and exercise of such a power to re-open a case or re-hear a complaint which has been dismissed is against public interest as it contravenes the wholesome principle of *autre fois acquit*. In the case of the discharge of an accused under sec. 253 there is a trial, the presence of the accused, and the decision on a point or points for determination. It is highly prejudicial to the accused that there should be the probability that the case that has been once dismissed may again be re-opened and should hang in *terrorem* over his head and harass him. In the case of a discharge of the accused under sec. 259 owing to the default of appearance of the complainant to prosecute the case there is the same argument against the exercise of the so-called inherent powers to review an order once passed. The case is thrown out and the accused who is ready to answer the charge, if established or proved, is discharged. It is iniquitous that he should be dragged to Court at the instance of the complainant and at the instance of the same Court that has discharged him. It is another thing when the order is set aside by a higher tribunal and further enquiry is ordered. In the case of orders under sec. 203, the new Criminal Procedure Code (Act V of 1898) adds a new rule of law, and that is to the effect that the Magistrate should briefly state his reasons for the same. In the older Acts there was an express provision for re-hearing or re-entertaining a complaint that was once dismissed. With the addition of the new clause abovenamed those express provisions were dropped and an entirely new section, *viz.*, sec. 437, was added. The object certainly was to take away the powers once exercised and vest in the superior judicial tribunals the power to order further inquiry in such cases, though these orders are not judgments in the sense of secs. 367-369 of the Code. Orders under sec. 203 are more or less adjudications on the merits of a case, and it is certainly prejudicial to the accused that the Magistrate who once threw out a charge against him should himself entertain the same. Both the Calcutta and the Madras High Courts held, in a series of decisions, the earlier view that negatived the power of Courts to re-hear a case in which the accused was discharged or to re-entertain a complaint

which was dismissed. This seems consistent with public interest and public policy. The change began with the case in 5 C. W. N. 169 and in Madras with 29 Mad. 124. But the earlier view is certainly the more reasonable, and should prevail.

#### CURRENT INDIAN CASES.

SIVA SANKARA v. SOOBAMANIA, I. L. R. 31 Mad. 517. *Succession Act, secs. 101, 102—Hindu wills.*

Sec. 101 of the Succession Act applies to Hindu wills. Where by the provisions of a will the distribution is to take place only after all the sons who may be born to the sons of the testator have attained their majority, held that the disposition is invalid under secs. 101 and 102 of the Succession Act.

#### Reviews.

MR. SERJEANT STEPHEN'S NEW COMMENTARIES ON THE LAWS OF ENGLAND (partly founded on Blackstone). By his Honour Judge Stephen. Fifteenth edition, under the general Editorship of Edward Jenks, Esq., M. A., B. C. L., of the Middle Temple, Barrister-at-Law. Thoroughly revised and modernized, and brought down to the present time. In Four Volumes, London: Butterworth & Co., Law Publishers. 1908.

Notwithstanding the criticisms that have from time to time been levelled against Blackstone's Commentaries, they still hold the field as the most popular and easily understood introductory to the study of the laws of England. But the merits of the work, which are still recognised, did not long conceal from students of legal history the many historical inaccuracies and fanciful explanations regarding the origin and growth of institutions. The first edition of the present treatise originated no doubt in an endeavour to bring the commentaries up-to-date. But as time went on Stephen's Commentaries, too, got out of date, in consequence of the great development of the English case law and statute law during the last century, as also by the results achieved during the century by historical researches. To keep pace with these the commentaries have passed through successive editions of which the present is the latest. The present edition covers the whole field of the English law as it is to-day, the latest developments in the various branches of that law being touched upon at their appropriate places. The whole book has been subjected to revision by experts in the different branches of the law. The present editors have tried to preserve the essential features of Blackstone's Commentaries, and have in fact gone so far in their conservatism as not to interfere with some of the hoary historical fallacies which have become associated with the name of Blackstone. We think it is time that these should be

completely eliminated. Substantial improvements have, however, been made in the statement of the law in every portion of the work, and the editors have on the whole acted wisely in adhering to the original plan of the work, which has secured for it its long continued popularity. The part which has been subjected to the most radical alterations is that dealing with the subject of "the Social Economy of the Realm." The original somewhat diffuse treatment of the subject has given place to a more concise and intelligible statement of such matters as have any legal interest. In the hands of those responsible for the present edition, the continued popularity of the work is assured.

THE DIGEST OF ENGLISH CASE LAW, containing the reported decisions of the Superior Courts and a selection from those of the Scotch and Irish Courts with a collection of cases followed, distinguished, explained, commented on, overruled, or questioned from 1898 to 1907 inclusive. Forming a supplement to Mew's Digest of English Case Law, 16 Vols. By Edward Monson of the Middle Temple, Barrister-at-Law. Vols. I and II. London: Sweet & Maxwell Ltd., Stevens & Sons Ltd., 1908.

The present digest, in two volumes, of English cases reported during the years 1898-1907 follows the line of Mew's well-known consolidated Digest and Annual Digests. These digests embrace not only the cases decided by the English Courts but also the statutes enacted during the period. We have tested the present work and found it very helpful in finding out references. Some Indian cases decided by the Privy Council which are of general interest have found their way into the present work. But the references are not to the Law Reports, Indian Appeals Series, in which they are regularly reported and which are easily available. We would suggest that in preparing future editions of these digests, the editors should have this series before them. This would undoubtedly enhance their usefulness to Indian practitioners. The classification and arrangement of the subject-matter are all that one would desire in a work of this kind, and it does credit to the editors and publishers of the work that it should have been brought out in this shape with such expedition.

THE ANNUAL DIGEST of all the reported decisions of the Superior Courts, including a selection from those of the Scottish and Irish Courts, with collection of cases followed, distinguished, explained, commented on, overruled or questioned, and references to the statutes passed during the year 1908. By John Mews, Barrister-at-Law. London: Sweet & Maxwell Ltd., Stevens & Sons Ltd. Law Publishers. 1909.

This is the Annual Digest of the English

cases and statutes for the year 1908. The carefulness in editing and neatness of execution with which previous editions of the work have made us familiar, characterise also this volume. We have no doubt that the present volume will prove useful to the profession as its predecessors.

## Notes of Cases.

### CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL APPELLATE JURISDICTION. Before CASPERSZ and RYVES, JJ. CRIMINAL APPEAL NO. 965 OF 1908. SRIPATI MADAK, Appellant, v. THE KING-EMPEROR, Opposite Party. 17th February 1909.

*Penal Code, secs. 302 and 304—Causing death by one blow with the back of a kodali.*

This was an appeal from a conviction under sec. 302, I. P. C. There arose a dispute between one Abdul and the Appellant regarding irrigation of the land of Abdul. Abdul wanted to take water to his fields from a certain reservoir to which the Appellant objected. On the remonstrance of the Appellant, Abdul desisted for a time from taking water. But after nightfall, he again came with his father to take the water. On this the Appellant was much enraged and gave a blow to Abdul on his left side with the back of a *kodali*. That blow was sufficiently severe to fracture two ribs, effect a rupture of the spleen and cause injury to the lungs. Abdul died from the effects of the blow. The Appellant on these facts were convicted under sec. 302, I. P. C., and sentenced to transportation for life by the Sessions Court.

On appeal to the High Court their Lordships observed:

"On these circumstances, we think that the offence was not one of culpable homicide amounting to murder. If the Appellant had so chosen he might have struck the deceased with the sharp end of the *kodali*, and he might also have repeated the blows. It seems to us that the case is more properly one within the purview of the first part of sec. 304 of the Indian Penal Code; and the ends of justice will be met by a sentence of 7 years' rigorous imprisonment."

Babu Monmatha Nath Mukherjee for the Appellant.

Mr. Orr for the Crown.

B. C.

Sentence reduced.

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### NOTES

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## INDIAN LAW MEMBER OF THE VICEROY'S COUNCIL.

The appointment of the Hon'ble Mr. S. P. Sinha, the Advocate General of Bengal, to the responsible office of the Law Member of the Viceroy and Governor General's Council is a momentous event in the history of British India.

During the Mahomedan rule, Indian noblemen and gentlemen of ability were not only closely associated with the executive government of the country but were also not unfrequently entrusted with the supreme command of the army both in the Courts of the great Moghuls and in those of their Provincial Viceroys. Those who are familiar with the result of this policy of trust and confidence in the children of the soil on the part of the more eminent of the Moghul Emperors, will not for a moment question that the strength and solidarity, and in no less degree, the popularity of the Moghul rule throughout the length and breadth of India were the direct result of this statesman-like policy.

From the contact of the East and West, it was inevitable that a fusion should take place between the Eastern and Western institutions. Although the present Government of India carries with it many a mark of Eastern personal rule yet it would be an affectation to deny that in its professed policy and constitution it is essentially a Western institution. It may be autocratic in its ways yet it is a responsible government. Where, however, it differs from the western type of responsible government, is that it is not responsible to the people of the country but is so only to His Majesty's Ministers and the British Parliament.

Almost from the beginning of the British rule, it has been repeatedly declared, announced and proclaimed in official despatches, in Parliamentary Statutes and Royal Proclamations, that Indians are to be freely and impartially admitted to all offices the duties of which they may be qualified by their education, ability and integrity to discharge. Notwithstanding the success of the experiments tried in the judicial line it must be admitted that the policy of these proclamations has been very slowly acted upon. The reason for this is the longstanding mutual distrust between the West and the East which is founded on no more solid foundation than ignorance.

It is worthy of mention that the name of Mr.

Justice Dwarka Nath Mitter, than whom no Indian judge has left a more lasting reputation for legal learning combined with rare qualities of intellect and force of character, was once mentioned as a probable legal member of the Viceroy's Council. It is said that Lord Mayo was strongly in favour of his appointment but, perhaps, blind western prejudice and distrust of their eastern fellow-citizens, which was much stronger in the early seventies than it is to-day, proved too strong to be overcome even by the Viceroy.

It is, therefore, a matter of national congratulation to the Indian people, that in the history of British rule, extending over a period of one hundred and fifty years, for the first time an Indian gentleman has been accepted as a colleague of the Viceroy in the Executive Council of the State. A section of the Anglo-Indian press, some British statesmen and even a few veteran Anglo-Indian officials, held in high regard in this country, are viewing the admittance of an Indian to the inner councils of the State with unreasoned prejudice and vague apprehensions. It is, however, a matter of common experience that when Indian gentlemen are taken into confidence by Government, they serve the State with at least as much loyalty as Anglo-Indian officials. Mr. Sinha in training and culture is much above the average class of his countrymen and by the practice of the honourable profession to which he belongs he has been in the habit of keeping the confidence of his clients for the last twenty years. Nothing can be more unjust, therefore, for the opponents of his or similar appointments, than to suggest that he or any other equally qualified Indian gentleman is unworthy of being taken into confidence regarding any affairs of the State however momentous. If we have read Indian character rightly we can make bold to say that one of its chief characteristics is, that confidence begets in the Indian mind a moral responsibility in respect of the object of confidence, to which one's own personal, racial or even patriotic predilections occupy a secondary place.

*Salus reipublicæ est suprema lex* is a maxim which has by no means a less strong hold on the educated Indian citizen than it has on the British. We are sure therefore that the Government will find their choice unexceptionable from every point of view. We feel justly proud that the first Indian gentleman who has been selected to fill this high office is a member of the Calcutta Bar. Further, it is no less a matter of gratification to us to find that the suggestions we have made in our columns for a number of years in respect of this appointment have not gone in vain. We congratulate the Secretary of State and His Excellency the Viceroy on the excellent choice that they have made, and no less Mr. Sinha, for being called upon to occupy the position which

has been immortalized by such men as Lord Macaulay, Sir Henry Maine and Sir James Fitz James Stephen.

#### THE HON'BLE MR. S. P. SINHA.

Mr. Sinha was born at Raipur in the District of Beerbhoom on the 24th March 1863 in the ancient *kayastha* family of which the Paikpara Raj is a branch. He was the youngest son of late Siti Kantha Sinha who was well known at Beerbhoom as a pleader and, later on, as a popular Munsif. Siti Kantha died leaving a fair property and four sons of whom the eldest, the late Rama Prasanna Sinha, was for many years the Government pleader of Beerbhoom. Mr. Narendra Prasanna Sinha, the third son, was a Major in the Indian Medical Service, now retired, and is at present residing in England. Major Sinha and Mr. S. P. Sinha were both educated in their early years at the Beerbhoom Zillah School and it was from this school that, in the year 1877, Satyendra Prasanna went up for his Entrance Examination and passed in the First Division. At that time, his elder brother, Narendra, was studying medicine at Calcutta in the Medical College. After passing the Entrance Examination Satyendra Prasanna came down to Calcutta to stay with his brother at a student's mess in College Street and joined the Presidency College. Two years afterwards, he passed the F. A. Examination with credit having stood 10th in order of merit in the list of successful candidates and secured one of the senior scholarships. After this he studied for the B. A. at the same College up to the 4th year standard but did not obtain the degree as before he could appear for the examination he and his brother Narendra left for England for qualifying themselves for professions that would secure for them a better career than was open to the average young men in this country. When in England, Narendra continued his studies of medicine while the choice of his younger brother was for some little time undecided. Mr. S. P. Sinha at first thought of going up for the Indian Civil Service. But because of the age limitations he was obliged to change his mind and took seriously to the study of law for qualifying himself for the Bar. He joined the Lincoln's Inn. Mr. Sinha's career at the Inns of Court was very remarkable. He carried away almost all the prizes offered by the Inns of Court at his time aggregating to 550 gns. As a result of his distinguished career at the Inns of Court, Mr. S. P. Sinha was exempted by the Benchers of his Inn from offering himself for the examinations of the Council of Legal Education and was called to the Bar even before he attended the usual number of terms at his Inn. He was called on the 7th of July 1886. In the same year Dr. Sinha also got into the Indian Medical Service.

Mr. Sinha was admitted as an advocate of the

Calcutta High Court on the 18th of November 1886. His first experience at the Bar was marked by the proverbial struggles of briefless barristers. For several years he had to keep himself going on the meagre income he derived as a Law Lecturer at the City College and as the legal adviser to the Paikpara Raj. Many were the occasions when the chronic financial stress of his junior days drove Mr. Sinha, who was already married and was the head of a family, to a degree of despondency and despair that made him seriously contemplate beating a retreat from the Calcutta Bar and settling down at some mofussil station where his struggles for existence would be less severe. In his early struggles, the late Jadav Chandra Dutt, then a promising young solicitor, used to help Mr. Sinha with an occasional undefended brief and Mr. Sinha has been known frequently to refer to this gentleman in grateful acknowledgement of these small favours which were at the time more welcome to him than even the most paying briefs of the present day. The credit of helping him on in the profession also belonged to a much greater degree to the late Babu Opurba Kumar Ganguli, who but for his sudden death a month ago would have had the satisfaction of seeing his once young protegee as the recipient of a unique honour today. We should not omit to mention in this connection that Mr. Sinha had also received great encouragement from Mr. Justice Norris during the early part of his career at the Bar.

The real starting point of Mr. Sinha's fame dates from his notable cross-examination, in 1894, of Mr. Farr, then an attorney of the High Court and a partner of the firm of Messrs. Farr and Pugh. This incident brought Mr. Sinha to the front and ever since he has enjoyed the reputation of being an advocate of great ability. His abilities were recognised by the Government in January 1904 when he was appointed the Standing Counsel. He officiated as Advocate-General from April to October in 1906 and on the retirement of Mr. O'Kinealy in March 1908, he was again appointed to officiate as such until in June 1908 he was confirmed and made permanent. It goes without saying that in both those capacities Mr. Sinha has given entire satisfaction both to the Government and to the public.

We cannot do better than conclude this biographical sketch of the new Law Member by quoting below the remarkable tribute paid to him by Lord Morley in the course of the memorable debate on India in the House of Lords on the 23rd of February last.

The noble Marquis opposite said the other day that there was going to be a vacancy in one of the posts on the Viceroy's Executive Council. Now suppose there was in Calcutta an Indian lawyer of large practice and great experience in his profession, a man of sustained professional and personal repute, in close touch with European society and much respected, and an actual holder of im-

portant legal offices; am I to say to that man—"In spite of all these excellent circumstances to your credit, in spite of your undisputed fitness, in spite of the emphatic declaration of 183; that fitness is to be the criterion of eligibility, in spite of that noble promise in Queen Victoria's Proclamation of 1858—a promise of which every Englishman ought to be for ever proud if he tries to adhere to it and rather ashamed if he tries to betray or mock it—in spite of this, usage and prejudice are so strong that I dare not appoint you, but must appoint instead some stranger to India from Lincoln's Inn or the Temple." Is there one of your Lordships who would envy the Secretary of State who had to hold language of that kind towards a meritorious candidate—one of the King's equal subjects?

## Review.

THE LAWS OF ENGLAND. Being a complete statement of the whole law of England. By the Right Honourable the Earl of Halsbury, Lord High Chancellor of Great Britain 1885-86, 1886-92, and 1895-1905 and other lawyers. Vol. IV. London. Butterworth & Co., 11 and 12, Bell Yard. Temple Bar. Law Publishers. 1908.

The titles dealt with in this volume are Carriers, Charities, Choses of Action, Clubs, Commons and Rights of Common. Each of these will be found of interest to lawyers and legislators in this country. There is hardly anything in the treatment of the two first-mentioned subjects which will not deserve careful study by the Indian lawyer. The statement of the law as gathered from reported decisions and statutory enactments is both lucid and up-to-date. We notice several references to the case of *East India Railway Co. v. Kalidas Mukherjee* [1901], A. C. 396 (s. c. : 5 C. W. N. 449), in the treatment of the subject "Degree of care necessary" in a carrier of persons. A glance at the various heads under which each of these subjects are treated will convince the reader of the thoroughness with which they have been worked up. The title "Charities" is of special interest to law reformers in this country. It is surprising how little has been done by the Legislature to protect charitable and religious endowments in this country. The Government here is no doubt handicapped by its well-grounded attitude of neutrality and non-interference in the matter of the religious beliefs and institutions of the people of this country. Religious differences are however quite as acute, if not more so, in England. The contrast presented by the legislatures in England and in India in this matter shows conclusively that the Legislature here has carried its policy of non-interference to very unnecessary lengths. The fate of the Bill recently introduced in the Governor-General's Council by Dr. Rash Behary Ghosh is an instance in point. The titles "Choses in Action" and "Commons" and "Rights of Common" do not require special mention. They are subjects with which every law student in this country is familiar. We need only notice that the authors

have in each instance been unavoidably led into excursions of a more or less historical character notwithstanding that the professed object of the treatise is to state the law as it is.

"Clubs"—the other subject dealt with—are essentially modern institutions, but their rapid and extensive growth in recent times have brought them into great prominence, at any rate, in England; and they are bound sooner or later to assume similar importance in this country. The very lucid and complete account which has appeared of these institutions, and their legal position, in the present volume will be found very useful by those interested in this subject.

Having carefully followed the progress of the treatise through four volumes, we have now no hesitation in saying that the editors and contributors have risen fully equal to the greatness of the task undertaken by them, and we look forward to its completion at a not very distant date with a great deal of expectancy and confidence.

### Notes of Cases.

#### ENGLISH LAW COURTS.

##### PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

THE LORD CHANCELLOR.

LORD HAINSBURY.

LORD ATKINSON.

LORD SHAW.

SIR ARTHUR WILSON.

1909,

3, March.

TILAK

v.

KING-EMPEROR.

*Indian Penal Code, sec. 124A—Seditious libel—Motive, evidence of, if admissible—Intention—Seditious evidence—Funder of charges.*

This was an application for special leave to appeal to His Majesty in Council. The facts of the case are shortly as follows:—

The accused was, the editor, publisher and proprietor of a weekly newspaper, called *The Kesari*. Two articles, entitled "The Country's Misfortune" and "These remedies are not lasting," appeared in two issues of the paper dated respectively the 12th May 1908 and 9th June 1908. Complaints were lodged separately in respect of these articles before the Chief Presidency Magistrate of Bombay who passed two separate orders for commitment of the accused to Sessions on charges under secs. 124A and 153A of the Penal Code in respect of each article. On the application of the Advocate-General the two cases were consolidated at the Sessions trial which was held before Dattar, J., but the trial on one of the charges under sec. 153A was, on the application of the Advocate-General, held over. All the four charges appear to have been read over by the Clerk of the Crown to the accused who pleaded not guilty on all the four

charges. The accused was tried before a special jury composed of seven Europeans and two Parsees. The prisoner objected to being tried by a special jury the majority of whom did not understand the language in which the articles were written. The objection was overruled and the special jury by a majority of seven to two returned a verdict of guilty. The accused was sentenced, in respect of each of the two charges under sec. 124A, to three years' transportation, the sentences to run consecutively. He was further fined Rs. 1,000 on the charge under sec. 153A. The remaining charge under sec. 153A was not proceeded with and the accused was acquitted on that charge. The accused applied to the Advocate-General to state a case for a review by the Full Court, but the Advocate-General refused to grant the necessary certificate. The accused then applied to the High Court for a certificate that the case was a fit one for appeal to the Privy Council, but the application was refused.

*Mr. Bankes, K. C.* for the Petitioner said:—"My Lords, my principal case has reference to the first article. My main submission is that in a case of seditious libel evidence of what the accused may have written or said at another time is not admissible; that the accused is entitled to be tried with reference to the words used, written or spoken which it is alleged amount to seditious libel and upon those alone. The prosecution tendered as evidence various articles which appeared in the said newspaper after the 12th May and in the interval between the 12th May and the 9th June, and a post-card. My submission is that there was illegality in the procedure in the way in which the trial was conducted, because the accused was entitled to be tried in respect of the first article by reference to the fact that he was not so tried worked substantial injustice to him, because the course taken enabled the prosecution to lay before the jury at one and the same time, not only the first but the second article. I further submit that grave injustice was done to the accused because other articles and the post-card were admitted in evidence and, the summing-up of the learned Judge to the jury, though I wish to say at once that he obviously desired to be extremely fair to the accused, suffered from the initial mistake, that this evidence which was inadmissible, had been admitted. If the article had been taken by itself the accused had certainly a reasonable chance of acquittal and that the course which was taken did most seriously prejudice him because not only with reference to the post-card but with reference to the isolated expressions in some of the other articles the case presented to the jury if presented on the basis that they were entitled to take all the articles into consideration was a different case from the one which would have been presented to them if they had been properly directed as I submit they ought to have been.

LORD HALSBURY.—What do you say would have been the proper direction?

Mr. Bankes.—The proper direction would be first of all to try the accused with reference to the first article.

LORD HALSBURY.—But you avoid my question by that phraseology. What do you say is the issue on a question of libel of this sort which ought to be presented to the jury?

Mr. Bankes.—Whether the language of the first article, construed fairly as a whole, brings the case within sec. 124A, I. P. C.

LORD HALSBURY.—That is to say *quo animo*.

Mr. Bankes.—My Lord, I submit that the intention in the sense of motive is immaterial. Since the alteration of the language of sec. 124A the offence does not depend on the intention of the accused as it might possibly have been said to have done under the section as it originally stood.

LORD HALSBURY.—The explanation to that section seems to suggest that the motive is the very point as to which the tribunal must make up its mind, as to with what intention it was done. It does seem to suggest to my mind that the intention with which the thing is done is of the very essence of criminality.

Mr. Bankes.—My submission is to the contrary. The test in all these cases is what does the language mean. A man must be taken to have intended the consequences of his actions or the meaning of the words which he in fact used and it is immaterial to consider whether the man's motive was a good or bad motive.

LORD ATKINSON.—How can you get over the words "with a view to." "Does not the language "with a view to obtain alteration by lawful means" show that the motive must be taken into consideration?

Mr. Bankes.—Again I submit, that must be judged by the language.

LORD HALSBURY.—It seems a little curious that you should be contending that, because I should have thought the explanation is intended to shield a man from the mere use of the words unless they were uttered with bad motive. Suppose the learned Judge, instead of doing what he did do, had said in terms: "Gentleman, you have nothing to do with his motive; you must look at the language and however good his motive may have been which may only have been to remove something which he considered to be bad Government or what not, you must look at the language and keep your attention on that only, disregarding the object with which it was done; if you think the language is calculated to excite enmity, etc., convict him." Would that have been a good direction?

Mr. Bankes.—I submit it would have been a good direction subject to this that the learned Judge in charging the jury must also refer to the explanation. My submission is that you have to

judge the comments expressing disapprobation of the measures of the Government, with a view to obtain alteration by lawful means, from the language.

THE LORD CHANCELLOR.—There is a general statement of the character of the offence without any special reference to the object or motive and an exception follows upon it which refers to the view with which the thing is done. At the trial were these alternative propositions put before the jury whether it was within this first paragraph of sec. 124A, or whether it came within the latter paragraph?

Mr. Bankes.—No.

LORD ATKINSON.—Judging from the charge was not the whole defence that his motives were good and his object to effect a change by lawful means?

Mr. Bankes.—But that must be judged from the language.

THE LORD CHANCELLOR.—The view put forward by the Defendant was that the motive must be taken into consideration.

Mr. Bankes.—Yes, but it must be motive judged by the language that he used in the article charged. (He referred to Mayne's Indian Criminal Law, p. 552 and read sections 124A and 153A). I submit that sec. 124A as originally drawn contained very similar words to that with regard to the malicious intention of the writer or speaker, but as they stand at present there is a marked distinction between them which is that in a case of seditious libel, you have to judge by the language of the words written or spoken and by them alone.

LORD HALSBURY.—And disregard the intention?

Mr. Bankes.—If your Lordship means by intention whether it is accidental or intentional, I say, no; but if your Lordship means motive, I say, yes. Further, he referred to secs. 233, 234 and 235 of the Code of Criminal Procedure, and contended that the joint trial of the accused on three charges was illegal. He then read the article of the 12th May.

LORD HALSBURY.—Before you comment on that (article) will you tell me what is the meaning of "The rights of Swarajya?"

Mr. Bankes.—It is something equivalent, my friend tells me, to "Home Rule."

Mr. Cohen.—According to the translation they mean "Independent Government."

SIR ARTHUR WILSON.—"Swa" is the same word as "suam."

Mr. Bankes.—My submission is that he really has never been tried upon this article at all. What he has been tried on is a series of libels coupled with that post-card in which I do admit and ought to admit different language is used, but which was a separate and distinct offence and he was entitled to be tried upon each separately and independently. If I can satisfy your Lordships



that he never has been tried upon this article I respectfully submit it is one in which your Lordships should at any rate give him an opportunity of having the case fully discussed.

LORD ATKINSON.—Does not the second article deal with the same incidents, proceed on the same lines and enforce the same lessons?

Mr. Bankes.—Your Lordship asks me whether I think it enforces the same lessons. I think not. I think a different view may be taken of the language but of course that is for the jury.

THE LORD CHANCELLOR.—Does that article suggest something beyond constitutional remedies?

Mr. Bankes.—I do not think it does. But I admit that it is written in a different tone.

He then referred to the summing-up to the jury and submitted that the jury were directed to take the various articles as a whole and to find their verdict really on the articles as a whole, and, therefore, he was not properly tried upon the particular article.

THE LORD CHANCELLOR.—Was the case put before the jury by the Defendant that these were merely comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means?

Mr. Bankes.—Yes, my Lord. It was, but there was an objection to the charges being tried together and to the admission of the other articles. That was overruled. Then it appears that the accused did refer to the other articles to get rid, if he could, of the effect of these articles which were introduced; but the point I am taking is, he did object to the admission of the evidence. If the article itself does not exceed the limits of proper comments it is not admissible to show that at a subsequent date the particular man who on that occasion did not exceed the limits of criticism which the law allow did exceed it.

LORD HALSBURY.—But language is not necessarily very clear and what might be perfectly innocent in one connection might be suggestive of the very worst things in another connection. The language itself may be ambiguous.

Mr. Bankes.—Yes, I agree, my Lord, but it is not suggested here that the language was ambiguous.

LORD HALSBURY.—In one sense it is. Of course language may have a definite meaning, but do you mean to say that it was not suggested that the deprecation of violence was colourable and, what really was meant was to suggest violence? I presume that was the case for Crown. Was it not?

Mr. Bankes.—As far as I know the case for the Crown it was based on some cases which had been decided before the alteration of the law and it was contended that the intention of the accused was material.

LORD HALSBURY.—It is a loose thing to say that it is the use of particular words. The tone and

tendency may be one thing while the actual words used may be another.

Mr. Bankes then read out various portions of the summing-up to the jury.

THE LORD CHANCELLOR.—“The cult of the bomb,” “the secret of the bomb,” and “the double hint” are the titles of the other articles. Are those articles conceived in the spirit which you want us to put as the meaning of the first article?

Mr. Bankes.—I want your Lordships to exclude from the first any influence of the others.

THE LORD CHANCELLOR.—Let us suppose for the sake of argument that these articles recommended the use of bombs. Is it your contention that we have to isolate absolutely the first of a series of articles and that we are not at liberty even to look at the others?

Mr. Bankes.—Yes, my Lord.

THE LORD CHANCELLOR.—Although *ex-hypothesi* they are connected?

Mr. Bankes.—Yes. I submit that unless there is something ambiguous in the language no evidence is admissible of anything appearing in the paper after that.

LORD HALSBURY.—What do you mean by “unless there is something ambiguous in the language.” It does not mean that the mere words are susceptible of two meanings, but it may be that a thesis may be susceptible of an innocent meaning or may be colourably made recommending the assassination of people.

Mr. Bankes.—With great submission the question of whether it is colourably made recommending assassination depends upon the language used. If the language is not capable of that meaning—assuming that for the moment—you are not entitled to presume of language which was obviously capable of it, which was uttered by the man afterwards. In the English Courts, my Lords, upon this point of seditious libel there have been cases in which it has been discussed how far you may refer to other passages in the same newspaper and upon the principle that you must read the words with their context. Lord Ellenborough was very averse to admitting and advised the jury not to consider a passage in the same newspaper and he put it on the ground that you could not extend the principle beyond what was obviously necessary in order to read the words in their proper context.

THE LORD CHANCELLOR.—If you look at sec. 124A the substance of the offence is the bringing into hatred and contempt; then there is an explanation which enables the Defendant to say:—It may be that this article as it appeared would bring into hatred and contempt but I propose to show you that it is merely expressing disapprobation of the measures of His Majesty's Government with a view to obtaining their alteration by lawful means; my purpose was good and honest, my view

was merely to get reform by legal means. If that is the case, is not the enquiry between those two alternative propositions? Is not it possible to show that this was one of the series of articles within a month in which, *ex-hypothesi* bombs were indirectly recommended? I do not say it was so, but that is *ex-hypothesi*.

*Mr. Bankes.*—I submit, not.

He then dealt with the meaning of sec. 124A and submitted that with regard to certain sections in the Indian Penal Code, there were exceptions and under the Indian Evidence Act the onus of proving that the case was within the exception lay upon the accused; but there was no such rule with regard to explanations which are really in the nature of provisos as in sec. 124A. The words "with a view to obtain their alteration" etc., are there as defining or restricting the kind of disapprobation which is lawful.

THE LORD CHANCELLOR.—Can you split up the evidence into two parts? The first question arises under sec. 124A, the second under Explanation 2. If evidence is admissible upon Explanation 2, you cannot help its being there.

*Mr. Bankes.*—I should not contend that; what I mean is that the only issue under sec. 124A or under Explanation 2 is as to the real meaning of the words and you have to look at them alone.

LORD HALSBURY.—If once the words are capable of the meaning suggested how can you divide the issue? If the words are capable or not of that meaning how can you prevent evidence being given to show in what sense they were used or with what object?

*Mr. Bankes.*—If the words are capable of the meaning the person must be taken to have intended the meaning which they are capable of bearing.

LORD HALSBURY.—Surely that is not true. That would be a very extraordinary proposition.

*Mr. Bankes.*—I submit that is the law.

LORD HALSBURY.—No one could have given such a direction to a jury that if the words are capable of meaning that, they must mean that. That is a very extraordinary proposition.

*Mr. Bankes.*—I did not mean that at all, but that a man is intended to convey the meaning of which the words are capable *prima facie*.

THE LORD CHANCELLOR.—Can you prevent the broad view being taken or is it not right the broad view should be taken:—That the real question is: here is language which is open to this construction and people might naturally think so, but that being obvious you might still let him off if he had not any such intention—if his view was an honest view. Is not that in effect what the learned Judge said?

*Mr. Bankes.*—I should not have contested that proposition if the question of motive is introduced under the explanations. My point is that the

words "with a view etc.," have no reference to the motive.

THE LORD CHANCELLOR.—Your point is they do not refer to the mind of the person charged but to the interpretation of the document itself.

*Mr. Bankes.*—That is so.

LORD HALSBURY.—In your view it would be true for the Judge to tell the jury they have nothing to do with the question of the intention in the mind of the author if you find that these words in their natural application and in their ordinary sense tend to excite hatred and contempt and so on—that itself constitutes the offence and you need not enquire into the mind of the utterer at all. Would that have been a right direction?

*Mr. Bankes.*—Yes, my Lord.

He then cited the case of *Ramnath v. King-Emperor*, 40 Punjab Record, p. 1 (criminal judgments), and submitted that the law as it existed in India before the change, was altered for the purpose of bringing it into accord with the law of this country with regard to seditious libel. Here it has never been attempted to introduce evidence of statements made by the accused on other occasions either for the purpose of aggravating his position or to relieve it. Of course there may be cases in which the language used is ambiguous but that is not the case here.

*Mr. Bankes* then submitted that sec. 234 of the Code of Criminal Procedure did not permit of these charges being tried together; and that if sec. 235, C. P. C., were applied it must be read with sec. 71, I. P. C., in which case only one sentence could have been given.

LORD HALSBURY.—What is an offence made up of parts?

*Mr. Bankes.*—In this case they treat the transaction as one, I suppose in order to bring the case within sec. 71, I. P. C.

*Mr. Cohen.*—If your Lordship will look at illustrations to sec. 71 you will see it has no application to the present case. Sec. 35, I. P. C., applies to this case.

Petition for special leave to appeal in the case of *Pranjib v. King-Emperor* was then argued by *Mr. J. M. Parekh* (with him *M. J. Doherty*).

Counsel for the Crown were not called upon.

THE LORD CHANCELLOR.—Their Lordships are not able to advise His Majesty that leave to appeal be given in either of these cases.

*Leave refused.*

## CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before CASPERSZ and RYVES, JJ. CRIMINAL REVISION No. 1212 OF 1908. JAGABANDHU BARIK AND ANOTHER, Petitioners v. PANCHU GIRI, Opposite Party. 4th March 1909.

*Penal Code, sec. 379—No finding of dishonest intention in the Appellate Court's judgment—Dispute of a civil nature.*

The prosecution alleged that the accused with some others being the servants of the new Malik of a certain plot of land in the occupation of the complainant as a tenant, went upon the land and plucked away his cocoanuts and caught his fish because he (the complainant) did not agree to pay enhanced rent. One of the accused admitted the occurrence but pleaded that the land in dispute belonged to his master. The trying Magistrate found that the complainant was in possession of the disputed cocoanut trees and the tank and the accused had no right to take away the fruits and the fish which belonged to the complainant. He accordingly found the accused guilty under sec. 379, I. P. C., holding that they dishonestly plucked away the cocoanuts and caught away the fish of the complainant and sentenced each of them to a fine of Rs. 20.

On appeal, the Joint Magistrate upheld conviction and sentence; but he came to no express finding of dishonest intention; he however concluded his judgment by saying that the accused knew that the disputed land was in the possession of the complainant and they were not acting *bona fide*. The accused obtained this rule.

Their Lordships observed:—

"Although the first Court does say at the end of its judgment that there is evidence to show that the accused were dishonest yet the other findings and the documents produced seem to indicate the contrary. There is no finding as to dishonest intention in the Appellate Court's judgment. In our opinion the matter was one that should not have been taken up by the Criminal Court."

*Babu Nagendra Nath Ghosh* for the Petitioners.

*Rule made absolute, and fine if paid directed to be refunded.*

B. C.

CIVIL APPELLATE JURISDICTION. Before BRETT and FLETCHER, JJ. APPEAL FROM ORDER No. 24 OF 1908. PREO NATH KARMOKAR AND OTHERS, Appellants v. SHIBANUND SINGHA, Respondent. 16th February 1909.

*Execution of decree—Will—Probate—Device to defeat creditors—Estate of deceased.*

The appeal was against an order of the District Judge setting aside an order of the Munsif refusing an application made for execution of a decree against the father of the present Appellants and, after his death, against the Appellants as his legal representatives. Execution was taken out against the sons and certain properties which were alleged to belong to the estate of the deceased were attached. The sons objected to the properties being sold in satisfaction of the decree on the ground that under the Will executed by the deceased before his death, the properties had passed into the hands of his widow and that they had no interest in them. Probate of the Will was obtained before the application for execution was made. The Court of first instance considered the objection as valid and dismissed the application. The lower Appellate Court set aside the order of the first Court and directed that execution should proceed on certain terms. It held that the Will executed by the deceased was a transparent device to defeat his creditors and expressed the opinion that, that being so, the Court of first instance, in order to defeat this device, should have placed all the beneficiaries of the Will, to be represented by the executrix, on the record as representatives in interest of the testator and should have proceeded to execute the decree against the property held by the

*Held—*That as the estate of the deceased, since the grant of the probate, was vested in and represented by his executrix, the execution of the decree against the estate of the deceased could not proceed.

*Babu Harendra Narayan Mitter* for the Appellants.

*Babu Jogendra Chunder Ghose* for the Respondent

A. T. M

*Appeal allowed.*

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### REPORTS (85)

WE REGRET TO HAVE TO RECORD THE DEATH OF Mr. H. H. Remfry, one of the oldest attorneys of the High Court of Calcutta. Earlier in his career he worked in partnership with some other leading Indian and English solicitors but latterly he specialized patent business and in this line he occupied the premier place amongst the Calcutta solicitors.

WE HAVE OFTEN NOTICED IN THESE COLUMNS the growing political influence of lawyers in the councils of state all over the civilized world and notably in England and America. The Cabinet Council of the present Ministry in England is chiefly constituted of lawyers. President Taft like Mr. Asquith is a distinguished lawyer and it is no less remarkable that of the nine Ministers of his Government no less than five are eminent advocates of the American Bar. The Secretary of State, the Secretary of War, the Secretary of the Interior,

the Secretary of Commerce and the Attorney-General were all active members of the profession to which Mr. Taft belonged. Mr. Taft is said to have recently declared that the profession of law is virtually the profession of Government. The function of Government being the making and the maintenance of the law, the giving of legal form and expression to the wishes of the people and the directing of the action of Government on constitutional and legal lines, lawyers are naturally better fitted to manage the affairs of state than members of any other profession.

THE COURT OF CRIMINAL APPEAL IN ENGLAND in the recent case of *Rex v. Carman Dean* which was heard on the 6th of March last decided an important question of self-defence. The appellant in this case had been convicted of assault. The evidence was that the man hurt had offered to fight the appellant and aimed a blow at him which missed, whereupon the appellant knocked him down with a blow. The accused pleaded self-defence but the judge at the trial, amongst other things, directed that the accused had no right to return blow for blow. This direction was held to be incorrect and the Court of Appeal accepted as correct the law as stated in Archbold's Criminal Pleadings, Part. I, 23rd Ed., p. 837, that when a man is assaulted, i.e., when violence is offered to him, he is not bound to wait till he is actually struck, but may himself strike if that be reasonably necessary to ward off the blow aimed at him or to prevent further assault.

IN ANOTHER COLUMN WILL BE FOUND A VERY interesting note on "The theory of the judicial decision as influenced by the effect of an overruling decision" which we reproduce from the February number of the *Columbia Law Review*. The theory that judges simply find the law and not make it is not borne out by facts. That they do often legislate while professing only to "find the law" cannot be denied. It seems therefore only reasonable that a change of judicial opinion should have the same effect as an amending legislation and should operate prospectively and not retrospectively. This result has in fact been worked out though not without great difficulty

due to the fiction that judges do not make new laws but merely apply existing rules to new circumstances.

A NOTABLE INSTANCE OF JUDICIAL LEGISLATION IN this country is furnished by the decision of the Judicial Committee in *Sartaj Kuari v. Deoraj Kuari*, L. R. 15 I. A. 51 (1888), which laid down that the holder of an impartible estate has in the absence of special custom to the contrary an absolute interest in the estate. Previous to 1888 it was the accepted law that the holder of an impartible estate who was himself a member of an undivided family could not absolutely alienate any portion of the estate except for legal necessity. In *Abdul Aziz v. Appavasami*, 8 C. W. N. 186: s. c. I. L. R. 27 Mad. 138, the question arose whether certain judicial sales of an impartible estate in Madras which took place in 1873 and 1876 conveyed any title to the purchaser. Their Lordships of the Judicial Committee, observed that "this reversal of the previously accepted interpretation of the law does not displace its application to the construction of the contracts contained in the certificates of sale now under consideration \* \* \* \* \* In 1873 and 1876, when the sales took place, the parties must be taken to be bound by the law as it was at the time understood, and that the estate purchased by the Appellant was only the life interest of the then zemindar."

WE INVITE ATTENTION TO THE DECISION OF THE High Court in *Uday Chandra Kaji v. Nripendra Narayan Bhup*, 13 C. W. N. 310: s. c. I. L. R. 36 Cal. 287, in which it was held that when a tenure which was held at the same rent for a period of 150 years before 1884 was in that year split up into two, each portion bearing half the original rent, the new tenancies so created would not have the benefit of the presumption of permanency arising under sec. 50 of the Bengal Tenancy Act. As a proposition of law, it may be perfectly accurate to say that when the old tenancy is given up and an altogether new tenancy created in its place by a fresh agreement, the presumption under sec. 50 is displaced. But we do not think that the facts in the present case justify the inference.

THEIR LORDSHIPS APPEAR TO HAVE BEEN LARGELY influenced by the provision of cl. (3) of the section which seems to provide, specifically, for the application of the section to the case of the splitting of raiyati holdings. But this should not have been taken as, by necessary implication, excluding the application of the section to the case of tenures split up as in this case. It would have been quite consistent with the policy of the Act, to hold that the clause in question was an

instance of the special solicitude with which the Legislature guarded the interest of raiyats. Besides that clause does not appear to have been intended for cases where there has been no new contract of tenancy or where the terms of the old tenancy have been expressly or by implication preserved. The clause was apparently intended to protect raiyats holding portions of the original holding, even under new contracts. The case under notice is undoubtedly one of great individual hardship, and if the law has been correctly applied to it, it should be amended and the interest of a large body of tenure-holders effectively protected.

A CERTAIN PERSON CONTRACTS TO PURCHASE OF another certain goods, the price of which is fixed, the goods are ascertained but the contract provides that the price will be paid when delivery of the goods will be taken at a future date appointed by the parties. On the appointed day the vendor asks the purchaser to take delivery of the goods and pay the price. The purchaser refuses to do either. The vendor after this makes repeated offers of delivery of the goods on payment of the price but the purchaser persists in his refusal to perform the contract. He repudiates his liability under the contract. The vendor waits for a month or so and then brings a suit against the purchaser for the price of the goods as fixed by the contract with the allegation in the plaint that the contract goods are lying in his godown at the risk of the purchaser, who may take them away. Is such a suit maintainable? This question arose in the case of *P. R. & Co. v. Bhagwandas Chaturbhuj*, a report of which appears in 111 of 10 Bom. L. R. Knight, J., of the Bombay High Court, held that under the Indian Contract Act, the suit of the vendor in the form in which it was brought was not maintainable, though under the English law such a suit would lie.

UNDER SEC. 78 OF THE INDIAN CONTRACT ACT ownership of ascertained goods passes to the purchaser after a contract for sale when the whole or part of the price or when the earnest is paid or when the whole or part of the goods is delivered, but when the parties agree, expressly or by implication, that the payment or delivery or both shall be postponed, then the property in the goods passes to the purchaser as soon as the proposal for sale is accepted. So there is no doubt here that as soon as the parties entered into the contract for sale stipulating for future payment and delivery, the property in the goods passed to the purchaser. If the goods were lost or destroyed by fire or other causes after the contract, the loss would have fallen upon the purchaser and not upon the seller. But still the seller was held to be not entitled to the

price of the goods which the purchaser contracted to pay. This would appear to be an anomaly. Sec. 107 of the Indian Contract Act lays down what a seller may do when the purchaser refuses to perform his part of the contract for sale. This section says that when the purchaser of goods fails to perform his part of the contract, either by not taking the goods or by not paying for them, the seller may, after giving notice to the buyer of his intention to do so, resell the goods, after the lapse of a reasonable time, and the buyer must bear any loss, but is not entitled to any profit which may occur on such sale.

Knight, J., HOWEVER, HELD THAT THE ONLY right of the vendor was to resell the goods after a reasonable lapse of time and upon notice to the purchaser, and if any loss occurred on the resale, then to sue the purchaser for the recovery of the loss. But it may be said that sec. 107 is an enabling section, it does not say that the vendor shall resell the goods but it says expressly that the vendor may resell the goods. According to the learned Judge the provision of the Contract Act was exhaustive and hence unless the seller pursued the course provided by that Act, he had no remedy. In support of this view his Lordship relied upon the observation of the Judicial Committee in the case of *Mohori Bibi v. Dharmadas*, 7 C. W. N. 441: s. c. I. L. R. 30 Cal. 548, to the effect that the Contract Act, so far as it goes, is exhaustive and imperative. But giving full effect to the weighty pronouncement of the Judicial Committee, it might still be argued that the words "so far as it goes" makes all the difference necessary for holding that even if the Contract Act does not provide the only remedy to the seller, and that the words used in the section are not imperative but only permissive.

#### THE THEORY OF THE JUDICIAL DECISION AS INFLUENCED BY THE EFFECT OF AN OVERRULING DECISION.

Blackstone, maintaining that judges do not make, but simply find the law, asserted that a decision never creates a new rule of law but merely embodies a rule or custom which always existed. Bl. Com. 70. A resulting corollary of this theory is that a decision is not the law, but merely evidence of it, and an overruling decision does not abrogate or change the law of the overruled, but authoritatively asserts that it never existed. It necessarily follows that an overruling decision, unlike a repealing statute, must have a retrospective operation. Austin and later writers, instancing examples of judicial legislation, vigorously criticized Blackstone's theory as artificial and fictitious. Austin, *Jurisprudence* 77; Salmond, *Theory of Judicial Precedents*, 16 L. Quart. Rev. 376; Thayer, *Judicial Legislation*, 5 Harv. L. Rev. 172. Although Jessel, M. R., admitted that the equity judges had from time to time invented the rules of equity, *In re Hallet's Estate* (1879) 13 Ch. Div. 676, 710, the common law judges have steadfastly reiterated the Blackstone theory. *Norway Plain Co. v. Boston & Me. R. R.*

(1854) 1 Gray 263, 267. But its consequence, that an overruling decision must operate retrospectively, by reason of hardship and mischief in the impairment of contract and property rights acquired in reliance on the earlier decision, has had these results: (1) it has furnished compelling reason for adherence to the doctrine of *stare decisis*, Sharswood, J., in *Ram*, *Legal Judgments* 423; (2) it has led Courts when constrained to overrule their decisions, while professing allegiance to the orthodox Blackstone theory, to depart widely from a logical acceptance of it.

Equity Courts have, under some circumstances, refused to give common law decisions retrospective effect; for example, it has been held that an overruling decision shall not retroact so as to reopen settlements made in reliance on the decision at the time of the settlements. *Lyon v. Richmond* (1816) 2 Johns. Ch. 51. Perhaps the earliest evidence of the refusal of Courts in general to accept unqualifiedly the orthodox theory is the long established rule that the rights of *bona fide* purchasers at a judicial sale shall not be affected by the retrospective operation of the reversal on appeal or writ of error of the equitable decree or legal judgment under which they purchased. *Voorhees v. Bk. of U. S.* (1836) 10 Pet. 449, 475. Some Courts confine the exception to cases of judicial sales, *Harle v. Langdon's Heirs* (1883) 60 Tex. 565; *Delano v. Wilde* (1858) 11 Gray 17; others extend it to the case of a purchaser from a successful party to the first hearing before the citation of the writ of error, as distinguished from the appeal. *Lessee of Taylor v. Boyd* (1828) 3 Ohio 337; *Macklin v. Allenburgh* (1889) 100 Mo. 337. On the authority of an early Supreme Court case, 10 Bk. of U. S. v. Bk. of Wash. (1832) 6 Pet. 8, a Florida decision, *Fla. Cent'l. R. R. Co. v. Bisbee* (1881) 18 Fla. 68, in refusing to compel restitution by an attorney who was paid from the proceeds of a judgment later reversed, still further extended the rule, and put it in the general form that, as to third parties, whatever has been done while the judgment remains in full force is unaffected by reversal. Two early Pennsylvania cases, *Manges v. Dentler* (1859) 33 Pa. 495, and *Geddes v. Brown* (1863) 5 Phila. 170, bespeak a wider departure from the orthodox theory. The first proceeds avowedly on equitable principles, and, since it is a case of protecting one who claims under the party to the overruled decision, might have been put on the ground of later [Indiana] *Whittits v. Jack* (1884) 97 Ind. 579, 598, and Minnesota (*Bradshaw v. Duluth Mill Co.* (1892) 52 Minn. 56) cases which, while supporting the orthodox theory, make an exception in favour of parties to the overruled case and their privies, presumably on the principle of *res adjudicata*. The second, however, not an action of equity, and where neither party claimed under the parties to the overruled decision, vigorously maintains that parties should be entitled to rely on decisions existing at the time of the transactions.

This idea has been developed by the Federal Supreme Court. That Court, as was settled in *Gelpcke v. Dubuque* (1863) 1 Wall. 175—see the controversy between the Supreme Court and the Courts of Iowa following this case, *R. R. Co. v. Rock* (1866) 4 Wall. 177; *McClure v. Owen* (1868) 26 Ia. 243; *R. R. Co. v. McClure* (1870) 10 Wall 511—will not follow the latest decision of a State Court construing a statute, when the decision overruled a former decision upon which the parties relied in making the contract. That this rule is not merely a modification of the rule of comity, but, as pointed out by Miller, J., dissenting, in *Gelpcke v. Dubuque* (1863) 1 Wall. 175—see the controversy between the Supreme Court and the Courts of Iowa following this case, *R. R. Co. v. Rock* (1866) 4 Wall. 177; *McClure v. Owen* (1868) 26 Ia. 243; *R. R. Co. v. McClure* (1870) 10 Wall 511—a flat contradiction of the orthodox rule, impeaching the theory of a decision, appears from *Douglass v. Co. of Pike*, (1879) 101 U. S. 677, 687, where it was said that such a change of judicial construction should have the same effect as a legislative amendment, that is operate only prospectively. The overruled decision is not mere erroneous

evidence of law, but valid law entering into the obligation of contracts, which should not be impaired by a change of decision. But a judicial decision impairing the obligation of contract is not within the constitutional prohibition. *R. R. Co. v. Rock, supra*. Hence, a writ of error to a State Court will not issue, solely because of the overruling decision. If, however, subsequent to decisions interpreting the statute, a second statute is passed which would impair rights under the earlier statute and decisions, and the State Court reverses those decisions, the Supreme Court will take jurisdiction and hold the statute unconstitutional on the ground that the overruling decision shall not retroact to alter the rights of parties who relied upon the overruled. *Central Land Co. v. Laidley* (1894) 159 U. S. 109 (*semble*). It was on the fact of the existence of a subsequent statute that jurisdiction was taken in *Muhlker v. Harlem R. R. Co.* (1905) 197 U. S. 544; see *Larremore*, 22 Harv. L. Rev. 182. But of greater significance is the final extension in this case, of the rule of *Gelpcke v. Dubuque* (1863) 1 Wall. 175—see the controversy between the Supreme Court and the Courts of Iowa following this case, *R. R. Co. v. Rock* (1866) 4 Wall. 177; *McClure v. Owen* (1868) 26 Ia. 243; *R. R. Co. v. McClure* (1870) 10 Wall. 511—to situations where the overruled law consists not of a statute and decisions upon it, but entirely of decisions, relied upon by the parties.

The rule in *Gelpcke v. Dubuque* (1863) 1 Wall. 175—see the controversy between the Supreme Court and the Courts of Iowa following this case, *R. R. Co. v. Rock* (1866) 4 Wall. 177; *McClure v. Owen* (1868) 26 Ia. 243; *R. R. Co. v. McClure* (1870) 10 Wall. 511—has been adopted by some of the State Courts, *Ray v. Natural Gas Co.* (1890) 138 Penn. St. 576; *Falconer v. Simmons* (1902) 51 W. Va. 172; *Farrior v. New Eng. etc. Co.* (1891) 92 Ala. 176, but rejected by others. *Storrie v. Cortes* (1896) 90 Tex. 283. Its extension in *Muhlker v. Harlem R. R. Co.*, *Central Land Co. v. Laidley* (1894) 159 U. S. 109 (*semble*), has received some support in late State Court decisions. The first of three North Carolina decisions refused to allow a person accused of crime to be prejudiced by the retroaction of an overruling decision, *State v. Bell* (1904) 136 N. C. 674; the second, without reference to the statutory construction exception, similarly protected contract rights, *Hill v. Brown* (1907) 144 N. C. 117; the last however, made in the present year, characterized the first two as isolated exceptions made in cases of special hardship and returned to an adherence to the orthodox theory as qualified by the statutory construction exception. *Mason v. Nelson* (N. C. 1908) 62 S. E. 625. On the other hand, a recent Pennsylvania case, involving a mortgagee who had taken a mortgage on the faith of earlier judicial rules of construction of wills, *Hood v. Society to Protect Children* (Pa. 1908) 70 All. 845, while admitting that on principle decisions must retroact, refuses to apply the principle so as to prejudice the rights of the mortgagee, on the ground that the intention of the testator should not be defeated by a subsequent change of decision—the most extreme instance of the tendency to deny the orthodox theory of the common law.

It would seem that the reasons of justice, convenience, and sound business policy which have led the Courts to breach the fictitious Blackstone theory with exceptions, might well justify them in consistently repudiating it to the extent at least of guaranteeing to persons who have acquired property and contract rights in reliance on authoritative decisions of the highest Courts, the same security against the retroaction of an overruling decision as they at present enjoy in the case of a repealing statute.—*Columbia Law Review*.

#### CURRENT INDIAN CASES.

**SUNDARASASTRIAL v. GOVINDA**, I. L. R. 31 Mad. 518. *Easement—Adverse possession*.

Where two adjoining houses belonged to the

same person and the rafters of both the houses rested on the boundary wall, *held* that the sale of one of the houses with the wall to one did not affect the purchaser of the other house as to his right of easement for the support of rafters of his house upon the wall.

"To constitute a dispossession there must in every case be positive acts which can be referred only to the intention of acquiring exclusive control. See "Possession in Common Law," Pollock and Wright, pages 85 and 86."

**RADHAKRISHNA v. MUTHUSAWMY**, I. L. R. 31 Mad. 530. *Mortgage—Right of suit*.

A suit is maintainable for the enforcement of a simple mortgage by sale subject to a prior usufructuary mortgage to the same mortgagor.

**SAMASUNDARAM v. VADIVELU**, I. L. R. 31 Mad. 531. *Pleading—Decree in variance of claim*.

A Plaintiff cannot obtain a declaration on a title not alleged in his plaint.

**KRISHNAMACHARIAR v. KUPPANMAL**, I. L. R. 31 Mad. 540. *C. P. C. (Act XIV of 1882), sec. 396*.

Sec. 396, C. P. C., contemplates a discretion in the Court and it is not compulsory to appoint a commissioner to make a partition.

**EMPEROR v. MAHESHWARA**, I. L. R. 31 Mad. 543. *Cr. P. C., sec. 253*.

Where an accused is discharged under sec. 253, Cr. P. C., fresh proceedings cannot be taken against ~~testimony~~ the order is set aside.

**EMPEROR v. MADDIPATIA**, I. L. R. 31 Mad. 547. *Court Fees Act, sec. 31*.

An order directing an accused under sec. 31 of the Court Fees Act to repay to the complainant the fee paid on the latter's petition of complaint is no part of the sentence and the Appellate Court is not competent to set it aside.

#### Notes of Cases.

##### ENGLISH LAW COURTS.

**HOUSE OF LORDS.**—*The Refuge Assurance Company v. Kettlewell*. Before LORD LOREBURN, L. C., THE EARL OF HALSBURY, LORD ASHBOURNE, LORD MACNAGHTEN AND LORD JAMES OF HEREFORD without judgment. 5th March 1909.

*Life Insurance—Fraud of agent without the principal's knowledge or authority*.

This was the Defendants' appeal to the House



of Lords. The Appellants had issued a policy to the Respondent. After paying a certain number of premiums the Respondent called on one of the District Superintendents of the Company, and said she would give up the policy. It was proved that on this occasion the District Superintendent said to the Respondent "Keep on for five years and then you can get a free policy." This she did, and claimed a free policy which the Appellants refused to give her. The Plaintiff therefore brought this action for the repayment of the amount of premiums that had been paid by her on the false representations of the Defendants' agent. The Court of first instance directed the jury to the effect that if they found that the Defendants' agent was guilty of the alleged fraudulent misrepresentation, the Defendants had benefited by the fraud, and were liable even if the agent had acted outside the scope of his authority. The jury found a verdict for the Plaintiff. The Appellants' contention was that the agent had no authority himself to make any contract for them. The appeal was dismissed without judgment and the decision of the Court of Appeal affirmed.

*Mr. H. Manisty, K. C. and Mr. W. H. Owen (Messrs. H. Nield and E. A. Hichens with them) for the Appellants.*

*Mr. H. M. Given for the Respondent.*

HOUSE OF LORDS.—*Cooke v. Midland Great Western Railway of Ireland Company.* Before THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD ATKINSON and LORD COLLINS. 1st March 1909.

*Negligence—Liability of Railway Companies.*

In the above case the House of Lords followed the well-known case of *Lynch v. Nurdin* (1841), 1 Q. B. 29. The Respondent Company maintained a siding and an Engine turntable on their ground adjacent to a public road, and which was separated from the public road by a clay bank facing the road and thorn fence or hedge. There was and had long been a worn step in the clay bank facing the road and a gap between 3ft. and 6ft. wide in the thorn fence through which children and others could and did pass. The Appellant, 4 years 2 months old, entered the grounds through the gap together with two other boys the older of whom was 9½ years old. The two older boys placed the little boy on the turntable which they caused to revolve in order to give him a ride. The child's leg was severely crushed and had to be amputated. The jury found that the fence was in a defective condition and that the boys were allured through the hedge to the turntable by that negligence. £550 damages were awarded.

Their Lordships confirmed the decree. Lord Macnaghten observed:—"Persons may not think

it worth their while to take ordinary care of their property and may not be compellable to do so; but it does not seem unreasonable to hold that if they allow their property to be open to all comers, infants as well as children of maturer age, and place upon it a machine attractive to children and dangerous as a plaything, they may be responsible in damages to those who resort to it by their tacit permission, and who are unable in consequence of their tender age, to take care of themselves."

*Messrs. Barry, K. C., (S.-G.), Dudley White and M. Stebbing for the Appellants.*

*Messrs. Ronan, K. C., Featherstonhaugh, K. C., and Piers Butler for the Respondent.*

*Appeal dismissed.*

COURT OF APPEAL.—*In re the Etherington and Lancashire and Yorkshire Accident and Insurance Co., Ltd.* Before the LORDS JUSTICES VAUGHAN WILLIAMS, FARWELL and KENNEDY. 5th February 1909.

*Disease and death directly caused by accident—*

*Insurance Policy.*

Appeal from a decision by Channel, J. By a policy the Company agreed that should the person insured sustain any bodily injury caused by violent, accidental, external and visible means then in case such injury should within 5 calendar months from the occurrence of the accident causing such injury directly cause the death of the insured person, the said Company agreed to pay to his legal representative £1,000. There was a proviso to this effect. "Provided always and is hereby the essence of the contract, the policy only insures against death where accident within the meaning of the policy is the direct or proximate cause thereof, but not where the direct or proximate cause thereof is disease or other intervening cause, even although the disease or other intervening cause may itself have been aggravated by such accident, or have been due to weakness or exhaustion consequent thereon, or the death accelerated thereby." The person insured fell heavily on very wet ground and was wetted to the skin while hunting. His vitality was considerably reduced thereby and having to ride home he was attacked with pneumonia in the lungs of which he died. This pneumonia was caused by the wetting and having to ride home while wet and not actual disease and the question in this case was whether the death came within the meaning of the policy. Mr. Justice Channel held that it did and the Court of Appeal (Vaughan Williams, L. J., Farwell, L. J. and Kennedy, L. J.) held that Mr. Justice Channel was right and dismissed the appeal. Mr. Justice Channel's ruling was based on the ground that the words 'disease,

or other intervening cause" in the proviso meant cases of disease which arose independently of accident and not as in this case where the disease arose after the accident.

*Mr. McCall, K. C., and Mr. Crawford for the Appellants.*

*Mr. Satter, K. C., and Mr. Chubb for the Respondent.*

**COURT OF APPEAL.**—*Griffiths v. Fleming and ors.* Before the LORDS JUSTICES VAUGHAN WILLIAMS, FARWELL and KENNEDY. 2nd March 1909.

*Life insurance—Husband and wife—Joint lives, policy on—Interest of the husband in the life of the wife.*

In the above case the Court of Appeal decided a point of first impression, namely, has a husband as such an insurable interest in his wife's life?

It appeared that the Plaintiff and his wife were joint grantees of the policy, that the sum assured was to be payable to the survivor of the grantees on the death of such of them as should first die. The wife contributed £10 towards the first premium of £21. Soon after the granting of the policy the wife died.

LORD JUSTICE VAUGHAN WILLIAMS held that "the husband has now insurable interest in his wife's life which ought to be presumed." LORD JUSTICE FARWELL was of opinion that insurable interest need not necessarily be pecuniary interest. It might be, as in this case, personal interest founded on affection and mutual assistance.

*Messrs. J. A. Simon, K. C., and J. B. Porter for the Defendants, Appellants.*

*Messrs. A. M. L. Langdon, K. C., and F. Cuthbert Smith for the Plaintiff, Respondent.*

*Appeal dismissed.*

**COURT OF APPEAL.**—*William Cuenod & Co. v. Leslie and Wife.* Before COZENS HARDY, M. R., LORDS JUSTICES MOULTON and BUCKLEY. 12th & 15th February and 14th March 1909.

*Husband and wife—Tort of wife—Husband's liability—Judicial separation.*

This appeal raised the question of the liability of a husband in respect of a tort committed by his wife during the coverture where a decree for judicial separation had been obtained in the course of the action and before judgment.

The Plaintiffs were bankers and had dealings with Mrs. Leslie who was possessed of separate estate. They purchased for her certain bearer bonds and she obtained possession of them by false pretences and converted them.

In the course of his judgment the Master of Rolls observed:—"It is often said that a husband is liable at common law for his wife's torts commit-

ted during coverture. This language is sometimes used as though it implied a personal liability on the husband to the fullest extent. I think the true proposition is that at common law the husband and wife were liable to be sued jointly and to satisfy the judgment obtained in the action. If, however, the wife dies before judgment the husband is not liable. (*Capel v. Powell*, 17 C. B. 743). The husband, in truth, was only joined for the sake of conformity, and not with the view of asserting any individual right against him." Since the effect of a decree of judicial separation under sec. 26 of the Divorce Act, 1857, is to put an end to the marriage for the purpose of contract and wrongs, the husband is not personally liable in this case.

*Mr. Montague Lush, K. C., and Mr. George Wallace for the Appellant.*

*Mr. Ernest Pollock, K. C., and Mr. H. S. Simmons for the Respondents.*

*Appeal allowed.*

## CALCUTTA HIGH COURT.

### Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

**CRIMINAL REVISIONAL JURISDICTION.** Before CASPERSZ and RYVES, J.J. MISC. APPLICATION NO. 20 OF 1909. SASHI MUKHI DASSI (Complainant), Petitioner *v.* ASHUTOSH SARKAR (Accused) AND KING-EMPEROR. 16th February 1909.

*Warrant to compel attendance—Accused if may be permitted to appear by muktear and when.*

The complainant alleged that on the 24th November 1908 the accused who was the Talukdar of village Bijpur, District Bankura, and five of his servants and tenants came and under orders of the accused forcibly carried away the cut paddy from the complainant's land of which she was in possession under a registered *mokurari patta* and assaulted her. On a complaint being filed on 26th November the Sub-divisional Magistrate, ordered warrant to issue in the first instance and on 12th December on his own motion made an order permitting the accused to appear by his muktear till further orders, on the ground of illness though the accused was not personally present nor was any medical certificate filed.

On 9th January 1909, the complainant filed a petition alleging that the accused was not ill. On the same day the case was made over to the file of an Honorary Magistrate who disallowed the complainant's prayer to cross-examine the gomastha of the accused whom the complainant had called to prove the *mokurari patta*.

The complainant moved the High Court for a transfer.

*Mr. G. Sincar for the Petitioner.*

Their Lordships observed :

"We have heard the learned vakil for the Petitioner and read the papers ourselves.

"The only irregularity that we can discover is that sec. 205, Cr. P. C., has been wrongly relied upon to exempt the accused from personal appearance in Court. That section applies only to cases where accused persons are summoned. In the present instance a warrant was issued to compel the attendance of the accused. We do not think this is a case in which a rule should be issued to transfer the proceedings, but we may indicate our opinion by saying that the accused should be present at the trial unless of course the Magistrate is satisfied that by reason of his illness (as to which materials should be on the record) he is unable to attend personally. At any rate the accused should be present at the conclusion of the trial.

"The application is rejected."

*Application refused.*

**CRIMINAL REVISIONAL JURISDICTION.** Before CASPERSZ and RYVES, JJ. CRIMINAL REVISION NOS. 25, 47 AND 48 OF 1909. SATYA CHARAN SADUKHAN & ORS., Petitioners v. ROMENDRA MOHON BOSE, Opposite Party. 2nd March 1909.

*Joint trial of 2 persons for separate offences of the same kind—Criminal Procedure Code, sec. 239—Cantonment Code, secs. 168 and 283—Offence under.*

The Petitioners were grocers; they were prosecuted before the Cantonment Magistrate for having sold kerosine oil at a price higher than that fixed in their licences, tried together and convicted under sec. 283 of the Cantonment Code.

This rule was issued on the District Magistrate of the 24 Pargunnahs to show cause why the conviction and the sentences of the Petitioners by the Cantonment Magistrate of Barrackpore should not be set aside on the grounds, *inter alia*, (1) that two separate license-holders were illegally tried together; (2) that the condition inserted in the licenses by the Cantonment Committee that all vendors must sell at the Cantonment rates was *ultra vires*.

Their Lordships observed :—

"In his explanation on the first point the Cantonment Magistrate says, 'that the two accused were tried together, of whom the present Petitioner was one, for the same offences under the same section of the law which seems legal under sec. 239, C. P. C.' There is some confusion of thought in the mind of the Cantonment Magistrate. Two persons were tried together on similar but quite distinct offences punishable under the same section, and sec. 239 of the Criminal Procedure Code has no application. It is admitted by

the learned Deputy Legal Remembrancer that on this ground, and also on the second ground, the rule must be made absolute. There is nothing in the conditions attached to sec. 168 of the Cantonment Act which enabled the Cantonment Committee to insert in the licenses a condition that vendors are to sell at a particular rate."

*Mr. H. N. Sen with Babu Ratan Chand Boral for the Petitioners.*

*Mr. Orr, Deputy Legal Remembrancer, for the Crown.*

*Rule made absolute.*

**CIVIL APPELLATE JURISDICTION.** Before SHARFUDIN and COXE, JJ. APPEAL FROM ORIGINAL ORDER No. 40 OF 1908. KALI SANKAR MISSER. Decree-holder, Appellant v. OHIDUNNISSA BIBI AND OTHERS, Judgment-debtors, Respondents. Heard, 23rd and 24th February 1909. Judgment, 24th February 1909.

*Civil Procedure Code (Act XIV of 1882), secs. 244, 294, 311—Selling lot out of order—Undervaluation in sale proclamation—Inadequate price—Material irregularity—Substantial loss.*

An application was made under secs. 244, 294 and 311 of the Civil Procedure Code to set aside the sale of lot No. 4, being one of the properties sold in execution of mortgage decree. The applicant objected to the sale, alleging that the decree-holder fraudulently got the sale proclamation suppressed and also purchased the lot without taking the Court's permission to bid at the sale, that the decree-holder grossly undervalued the property at Rs. 50, though it was worth about Rs. 20,000 and himself purchased it for Rs. 11,000, that there was further irregularity in selling the mortgaged lot No. 4 first, without selling the mortgaged lot No. 3, which, if sold, would have satisfied the whole decree, that thus there was material irregularity both in publishing and conducting the sale and substantial injury to the applicant in consequence.

The Court below held that the sale proclamation was duly served, that there was no fraud, the sale proclamation was not suppressed, that the decree-holder obtained the Court's permission to bid at the sale on a previous day and the decree-holder's omission to obtain fresh permission to bid on the day on which the sale afterwards took place might be passed over as not a material irregularity under sec. 294 of the Code, as the original permission continued, that as a gross misstatement of the price must be held to have constituted a material irregularity affecting the knowledge of contending bidders about the value of the property, and that the mortgage decree-holder who was a trustee for the judgment-debtors should have followed his securities in the consecutive order in which they

were given on the mortgage and decree and as the sale of lot No. 4 was sold out of order, that was a material irregularity in conducting the sale, which resulted in substantial injury to the applicant. It therefore allowed the application. The decree-holder appealed to the High Court.

*Held*—That the regularity of the sale could not be impeached on the ground that plot No. 3 should have been sold first.

Before a sale can be set aside it must be shown not only that there was a material irregularity in conducting the sale but also that by reason of this irregularity judgment-debtor sustained substantial loss.

Inadequacy of price is no ground for setting aside a Court sale. Sales in execution of decrees ought not to be lightly set aside.

*Babu Harendra Narayan Mitter* for the Appellant.

*Babu Basant Kumar Bose and Moulvies Serajul Islam and Souglat Ali* for the Respondents.

A. T. M. *Appeal allowed.*

**CIVIL APPELLATE JURISDICTION.** Before MOOKERJEE and CARNDUFF, JJ. APPEAL FROM APPELLATE DECREE NO. 1381 OF 1905. MUSSAMAT RAJA KOER AND OTHERS, Defendants, Appellants *v.* GANGA SINGH AND ANOTHER, Plaintiffs, Respondents. 22nd February 1909.

*Public Demands Recovery Act, sale under—Judgment-debtor, right, title and interest of—Representation, doctrine of—Estoppel.*

The appeal was on behalf of some of the Defendants in an action for declaration of title to and confirmation of possession of immoveable property. The subject-matter of dispute was a certain ~~here~~ in a mouzah which admittedly belonged at one time to G. The Appellant as well as the Respondents claimed to have derived title from him and the question was whose title ought to prevail. On the 25th January 1874, G mortgaged the property to H who took the bond for himself and his brothers. On the 30th July 1883, the right, title and interest of G was purchased by D from whom the Respondents derived title on the 8th July 1899. The Collector sold the same property under the Public Demands Recovery Act in execution of a certificate issued against the heirs of G and the Appellant claimed title through the purchaser at that sale.

*Held*—The effect of a sale under the Public Demands Recovery Act was to pass to the purchaser merely the right, title and interest of the persons named as the judgment-debtor in the certificate.

*Shekast Hossein v. Sosi Khan* (1 L. R. 19 Cal. 783), *Rupram v. Isvar* (6 C. W. N. 302) and *Abdul v. Gojraj* (1 L. R. 23 Cal. 778) referred to.

The doctrine of representation and the principle of estoppel are not to be extended to cases of sales under the Public Demands Recovery Act.

*Rupram v. Isvar* (6 C. W. N. 302) and *Afraz v. Kulsimun* (4 C. L. J. 368) referred to.

Hence at the time when the certificate sale took place the persons named in the certificate as the judgment-debtors had no subsidiary interest in the property, the purchaser at the certificate sale acquired no title whatever and consequently the Appellants also derived no title from their vendor.

*Babu Hari Bhawan Mukherjee* for the Appellants.

*Babu Biraj Mohan Mojumdar (for Babu Dwarka Nath Mitter)* for the Respondents.

A. T. M.

*Appeal dismissed.*

**CIVIL APPELLATE JURISDICTION.** Before SHARFUD-DIN and COXE, JJ. APPEAL FROM APPELLATE COURT NO. 555 OF 1907. ABDUL HAKIM SAHA AND OTHERS, Defendants, Appellants *v.* RAJENDRA NARAIN RAI, Plaintiff AND NUR MAHOMED SHAHA AND OTHERS, Defendants, Respondents. Heard, 26th February and 2nd March 1909. Judgment, 2nd March 1909.

*Bengal Tenancy Act (VIII of 1885), secs. 52, 157, 188—Excess area in tenant's occupation—Suit for compensation for use and occupation—Maintainability—Co-sharers not made parties.*

The Defendants had a *jote* under the Plaintiff and others comprising 200 bighas of land. On measurement it was found that that area had increased to 320 bighas. The Plaintiff brought this suit for his share of compensation for use and occupation of the excess area of 120 bighas, which was described by definite boundaries. The Munsif gave the Plaintiff a decree for "rent for use and occupation" for that area at the rate of 12 annas per bigha. An appeal by the Defendants was dismissed. They then preferred this appeal to the High Court.

*Held*—That the landlords were not entitled to sue for compensation for use and occupation without suing at the same time either for ejectment or for rent.

*Khondkar Abdul v. Mohini* (4 C. W. N. 508) referred to.

That the Plaintiffs were entitled to treat the excess land as a new holding and not as an addition to the original holding and were entitled to sue independently of sec. 52, Bengal Tenancy Act, and so were not barred by sec. 188 of the Act.

*Khondkar Abdul v. Mohini* (4 C. W. N. 508) doubted and followed.

*Dr. Rash Behary Ghose and Babu Mohini Mohun Chuckerborty* for the Appellants.

*Mr. Mahamadul Huq and Babu Kally Kissen Sen* for the Respondents.

A. T. M.

*Appeal dismissed.*

# THE Calcutta Weekly Notes.

Vol. XIII.]

MONDAY, APRIL 12, 1909.

[No. 22]

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### REPORTS (Index.)

WE REGRET TO HEAR OF THE DEATH OF MR. Nagendra Nath Ghose which took place on the 5th April, at the age of 60. Although he was not a practising barrister, yet he attained through his literary talents a distinguished position amongst the members of the Calcutta Bar. In early life while he was struggling at the Bar he became better known to the public as the author of some excellent essays which he used to read before several literary societies than as an advocate of the Calcutta High Court. Gradually he gave up the practice of law and took to tutorial and journalistic career. He was for many years a professor of English literature at the Metropolitan Institution and as a teacher he attained considerable distinction. He was a Fellow of the Calcutta University for some years and was an active member of the Syndicate. On more than one occasion he contested the University seat in the Bengal Council but was not successful. Many years ago he started the weekly paper, *The Indian Nation*. This paper never reached a very large circulation and the literary finish of his writings was often more admired than his opinion on public questions. He was more or less a recluse and seldom took part in public life and in private life he was a student of philosophy. In his religious or rather philosophic faith he was in his early days a profound positivist and a devout follower of Comte. But with advancing age he reverted to the orthodox Hindu society and became a convert to one of its *Vaishnava* sects and his conservatism in respect of social, religious and political questions grew apace. Although many may differ from him in their opinions on many momentous questions yet every one will admit that his death removes from our midst a very talented Indian of the present times.

In *Rahimadulla Sahib v. Emperor*, I. L. R. 31 Mad. 140: s. c. 17 Mad. L. J. 584, a Full Bench

of the Madras High Court consisting of three Judges decided (Miller, J. dissenting) that action under sec. 476 of the Criminal Procedure Code should be taken either at the close of the proceedings or so shortly thereafter that it may reasonably be said that the order is part of the proceedings, and the majority generally approved of the reasoning adopted by a Full Bench of the Calcutta High Court in *Begu Singh v. Emperor*, 11 C. W. N. 568: s. c. I. L. R. 34 Cal. 551. In *In re Lachmidas Balji*, I. L. R. 32 Bom. 184, on the other hand, a Bench composed of Chandavarkar and Knight, JJ., strongly dissented from the decision of the Calcutta Full Bench and generally agreed with the dissenting opinion of Rampini and Gupta, JJ., as embodied in the Order of Reference in that case.

WE FOUND OURSELVES UNABLE TO AGREE WITH the decision of Chandavarkar and Knight, JJ., in the above case and we laid stress on several circumstances which in our opinion pointed conclusively to the soundness of the opinion of the Calcutta Full Bench. (See 12 C. W. N. clxxxi—clxxxiii). As we then pointed out, the dissenting opinion purports to be based upon the intention of the Legislature as plainly manifested by the language employed in the section. But as a matter of fact the language of the section is far from unambiguous. We showed also that upon broad considerations of justice and expediency it was not fair to the accused to arm a Judge, who has not himself tried the case in the course of which the offence is committed or is brought to the Court's notice, with power to direct a prosecution. Similarly it should not be left to the Judge who tried the case to make up his mind about the propriety of directing a prosecution in a different and later proceeding. In fact a Judge ought not to direct a prosecution which will necessarily deprive the person charged of the right of appeal and remedies ordinarily available against the complainant, if the charge should prove to be groundless, unless the commission of the offence is brought home to his mind by facts brought to his notice in the course of the trial.

THE QUESTION, WE ARE GLAD TO FIND, WAS ONCE more brought up before a Full Bench of the Madras High Court consisting of five Judges

(White, C. J. and Wallis, Miller, Sankaran-Nair and Pinhey, JJ.) at the instance of Benson and Miller, JJ., with the result that the majority have again decided in favour of the view adopted by the Calcutta Full Bench: *Aiyakannu Pillai v. Emperor*, I. L. R. 32 Mad. 49. Sankaran-Nair, J., puts the matter succinctly when he says "when a Court takes up the case sometime after, it acts really as a prosecutor placing the person proceeded against in a disadvantageous position without the safeguard of an appeal, while there is no guarantee of an opinion formed after consideration of all facts, which exists in the case of action taken at the time. I can see therefore no reason why a Court in those circumstances should be called upon to undertake any investigation or inquiry instead of leaving it to the properly constituted authorities."

### POSSESSORY SUITS UNDER SEC. 9 OF THE SPECIFIC RELIEF ACT.

*Definition of possession.*—Dr. Markby in his Elements of Law, Chap. IX (3rd Ed.), observes that in order to constitute possession in the legal conception of the term, there must be not only the physical power, or rather the possibility, to deal with the thing as one-likes and to exclude others but also the determination to exercise that physical power or control on one's own behalf. The term "possession" was viewed in a similar light by Roman lawyers—"To the notion of dominion was opposed that of *possessio*. A person might be owner of a thing, and yet not possess it or possess it without being the owner. Possession not only implied actual physical occupation or detention, to use the technical term, of the thing, but it also implied something more, in the sense in which it was used by the Roman lawyers. It implied not only a fact but an intention; not only the fact of the thing being under the control of the possessor, but also the intention on the part of the possessor to hold it, so as to reap exactly the same benefit from it as the real owner would, and to exercise the same rights over it, even though he might be well aware that he was not the real owner and had no claim to be so. The possessor had no rights over the thing; but he was entitled to have his possession protected against every one but the true owner, and length of possession would, under certain conditions fixed by law, make the possessor really become the owner of the thing possessed." (See Sander's Institutes of Justinian, p. 51). So the framers of the Indian Penal Code framed the following definition of possession:—"Corporeal property is in a person's possession when he has such power over it that he can exclude others from it, and intends to exercise, if necessary, that power on behalf of himself or of some person of whom he is guardian or for whom he is trustee."

*Nature of possession contemplated by this section.*—

Sec. 9 of the Specific Relief Act, it has been said, contemplates the case of a person who, being in physical possession of a property, is dispossessed; so where a Plaintiff was in constructive possession of a plot of land through his tenant and the latter was dispossessed it was held that the Plaintiff had no right to maintain a suit under sec. 9. It was held, further that the Plaintiff was not entitled to bring a suit even when subsequent to such dispossession the tenant in collusion with the person who dispossessed refused to bring a suit (*Sonatan Shome v. Sheik Helim*, 6 C. W. N. 616). The language of the section does not however seem to justify this interpretation. Ouster of a tenant may and often do result in an ouster of the landlord, and in such a case the remedy under sec. 9 of the Specific Relief Act should be available to the landlord, *Bindubasini v. Srimati Jahnavi*, 13 C. W. N. 303, and *Fanoki v. Dinamoni*, 13 C. W. N. 305. Where, however, a person was in possession by receipts of rents from the ryots the mere discontinuance of the payment of that rent would not constitute a dispossession within the meaning of sec. 9 of the Specific Relief Act (*Tarini Mohan Mojumdar v. Ganga Prasad Chakravorty*, I. L. R. 24 Cal. 649). So possession as contemplated by this section need not necessarily be actual physical possession, though it should be juridical possession. Possession of a certain room with the Plaintiff, as representing his father and uncle, who were alive, but not parties to the suit, was held not to be juridical possession in the Plaintiff so as to entitle him to maintain a suit under sec. 9, Act I of 1877. (*Nritya Lal v. Rajendra Narain Deb*, I. L. R. 22 Cal. 562). The word "possession" in sec. 145, Cr. P. C., seems to have the same meaning as the word "possession" in sec. 9, Act I of 1877, namely, juridical possession, *Sutherland's case*, 9 B. L. R. 222. But see *Dhondhai Singh v. Follet*, I. L. R. 31 Cal. 48, F. B. *Quere*, whether an agent in possession who is dispossessed can bring a suit under the section in his own name. On principle, such a suit should be instituted by the principal who is in fact dispossessed.

*What is immoveable property.*—A suit for the possession of a right of fishery in a khal, the soil of which does not belong to the Plaintiff does not come within the provisions of sec. 9 of the Specific Relief Act (*Feedu Phala v. Gour Mohan Phala*, I. L. R. 19 Cal. 544, F. B. Prinsep and Pigot, JJ., dissenting). See also (*Notabar Parui v. Kubir Parui*, I. L. R. 18 Cal. 80.) A hat, the possession of which is held by collecting tolls or rents is not an immoveable property within the meaning of sec. 9, Act I of 1877 (*Fuzlar Rahaman v. Krishna Prasad*, I. L. R. 29 Cal. 614); but both the Madras and Bombay High Courts have taken a contrary view. Vide *Bhundal v. Pandul*, I. L. R. 12 Bom. 221, where the right of fishing has been held to be immoveable property within the meaning of

sec. 9, Act I of 1877, as also *Krishna v. Akhilanda*, I. L. R. 13 Mad. 54, where a right to a ferry has been held to be immovable property or an interest therein within the meaning of sec. 9, Specific Relief Act (*Haru Dayal v. Kristo Gobinda*, 17 W. R. 70).

*What constitutes dispossession in due course of law.*—Dispossession as contemplated under sec. 9 of the Specific Relief Act must be illegal. If the dispossession is effected in due course of law no action can be maintained under sec. 9. A tenant in possession after the expiry of the term of his lease can only be ejected in the due course of law. A tenant holding over is, no doubt, a tenant by sufferance, but it does not follow that he is liable to be evicted by the landlord of his own authority. The possession of a tenant holding over is juridical possession and not wrongful. Such a tenant, if dispossessed may maintain a suit under this section. The words "due course of law" in the section mean the regular normal process and effect of the law operating on a matter which has been laid before it for adjudication (*Rudrappa v. Narasing Rao*, 29 Bom. 213). If such a tenant is dispossessed, it has been held that he is entitled to sue and recover possession under this section though a patta is set up by the Defendant (*Safad Khan v. Worpem Khan*, 7 W. R. 123). See also (*Jonardhan Acharjee v. Haradhan Acharjee*, 9 W. R. 512, F. B., *Arjoon Dutta v. Ram Nath*, 21 W. R. 123).

A matter may be considered to have happened in due course of law, if it is the result of the operation of the law, invoked by the ordinary method of any judicial proceeding. (Mookerjee, J.). So it has been held in *Leo Moore v. Monoranjan Guha*, 12 C. W. N. 696, that when a party is dispossessed by reason of an order under sec. 145, C. Cr. P., he is not dispossessed otherwise than in due course of law and is therefore not entitled to maintain a suit under sec. 9, Specific Relief Act. An order under sec. 145, Cr. P. C., it should be noted, purports to retain the person who was in possession within two months of the proceeding, in possession. The case does not decide what would happen if the order under sec. 145, Cr. P. C., is found to have been erroneous and the wrong person was given possession under it. As to the effect of an order under sec. 145, Cr. P. C., see the observation of the Judicial Committee in *Dinamani Chowdhurmi v. Braja Mohini Chowdhurani*, 6 C. W. N. 386; s. c. I. L. R. 29 Cal. 187, 199 and *Kalu Chander v. Adoo Shah*, 9 W. R. 602. In this connection it may be observed that though an order for possession under sec. 145, Cr. P. C., confers no title, the person found to be in possession can only be evicted by a person who can prove a better title (*Dinamani v. Braja Mohini*, 6 C. W. N. 386, P. C.).

*Mere possession is title against a wrong-doer.*—Possession, under the English law, however short

it may be, is by itself good title against a trespasser (*Asper v. Whit Lock*, L. R. 1 Q. B. 1). So also under the Indian law prior peaceful possession in a Plaintiff is sufficient evidence of his title against all but the true owner and a trespasser cannot resist his claim by shewing that the title and possession rest with a third person. The question frequently arises whether the Plaintiff in a suit for ejectment can succeed on proof of his mere peaceful prior possession if he brings the suit more than 6 months after dispossession. In *Khaja Enaitulla v. Kishen Sunder*, 8 W. R. 386, Mitter J., was of opinion that the Plaintiff on the sole ground of his prior possession and illegal dispossession without any proof of title is entitled to recover possession. In *Kowa Majhi v. Khewaz*, 5 B. L. R. 278, where the Plaintiff sued for recovery of possession after declaration of title and proved that he was in possession and had been wrongfully dispossessed by the Defendants and the Defendants were unable to give any better proof of their title, it was held that the Plaintiff could recover possession and that sec. 9, Specific Relief Act, was no bar to such a suit. In *Mohabeer v. Mohabeer*, I. L. R. 7 Cal. 591, it was held that sec. 9 of the Specific Relief Act has not the effect of doing away with the English rule that possession is *prima facie* evidence of title.

The Bombay High Court has held that possession is good title against any one but the rightful owner, *Peneraj v. Narayan*, I. L. R. 6 Bom. 215. This case has been followed in *Hanmant v. Secretary of State*, I. L. R. 25 Bom. 287. The Madras and the Allahabad High Courts have also taken the same view that sec. 9 of Act I of 1877 does not bar a suit for ejectment on the strength of possession against a trespasser even after the lapse of 6 months from the date of dispossession (See *Wali Ahmad v. Ajudhia*, I. L. R. 13 All. 537 and *Mustafa v. Santa*, I. L. R. 23 Mad. 179).

A contrary view was taken in *Parmessar v. Brojolah*, I. L. R. 17 Cal. 257, where it was held that mere previous possession would not entitle a Plaintiff to a decree for possession except in a suit under sec. 9 of the Specific Relief Act. But the question has practically been settled by the Privy Council in *Ismail v. Mahomed*, I. L. R. 20 Cal. 834, where it was held that sec. 9 did not bar a Plaintiff from suing for recovery of possession even after 6 months from the date of dispossession and that mere possession was good title as against a person who had no title.

In more recent cases, *Shyash Charan v. Abdul*, 3 C. W. N. 158, *Nisa Chand v. Kanchiram*, 3 C. W. N. 568 and *Fuzlor v. Raj Chandra*, 5 C. W. N. 234, the Calcutta High Court expressed a contrary view and the principle laid down in the Privy Council case, *Ismail v. Mahomed*, I. L. R. 20 Cal. 834, was sought to be limited to cases where a person in possession sues for a declaration of title upon proof of



mere previous possession of less than 12 years. These cases do not seem to have been rightly decided and have given rise to many difficulties. The matter has been discussed in a series of articles in 3 C. W. N., pp. cclxxiii, ccxcii, ccxciii, cclxiii and 6 C. W. N., p. ix, to which attention is invited.

**Limitation.**—The section itself is quite explicit upon the point. A suit for possession must be brought within 6 months from the date of dispossession. Considerable difficulties have, however, arisen as regards the point of time from which the period of limitation is to run in a title suit where the parties have had their possession determined by an action under sec. 9, Specific Relief Act. But the matter may be taken to have been finally settled by the decision in *Pratab Chandra v. Durga Charan*, 9 C. W. N. 1061, where the Plaintiff, who had been dispossessed by the Defendants of some lands appertaining to their taluq, forcibly dispossessed the Defendants and remained in possession until the latter recovered possession in execution of a decree under sec. 9, Specific Relief Act. The Plaintiff brought a suit for recovery of possession within 12 years from the date of his dispossession in execution of the possessory decree but more than 12 years after the original dispossession. It was held that the suit was not barred by limitation. The same view has been taken in *Mamtajuddin v. Barkatulla*, 2 C. L. J. 1, where the Plaintiff being the rightful owner of certain lands was wrongfully kept out of possession for less than 12 years and succeeded in regaining possession without the help of law and remained in such possession till evicted in execution of a decree under sec. 9, Specific Relief Act. It was held that the cause of action accrued on the date of dispossession under the decree under sec. 9, Specific Relief Act. This principle has been affirmed in *Jonabsharif v. Maharaj Surjya Kanta*, 12 C. W. N. 1081: s. d. I. L. R. 33 Cal. 821.

**Scope of decree under sec. 9, Act I of 1877.**—In a suit for possession under this section the Court cannot give the Plaintiff any further relief than possession and costs of the suit, *Tilakdas v. Fatik Chandra*, 1. L. R. 25 Cal. 803. A decree-holder in a possessory suit was held to be fully entitled to cut the crops standing on the land, *Sherajda v. Eman Bux*, 13 W. R. 104.

## Notes of Cases.

### CALCUTTA HIGH COURT.

#### Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

**CIVIL APPELLATE JURISDICTION.** Before SHARFUD DIN and COXE, JJ. APPEAL FROM APPELLATE DECREE No. 603 OF 1907. KANAI PRASAD BOSU, Appellant *v.* JOTINDRA KUMAR ROY CHOWDHURY AND ANOTHER, Respondents. 2nd April 1909.

**Surety for a tehsildar—Whether discharged by the laches of the master in taking accounts regularly—Contract Act, secs. 133 and 135.**

The Appellant stood surety for a tehsildar in the employ of the Respondents. In the *kabuliyat* which the tehsildar executed in favour of the employers there were the stipulations that the tehsildar should render accounts at the end of each year and on the rendition of accounts, any money found due must be made over to the employers; and unless these were done the tehsildar would not be able to enter upon his service for the next year. It was also stipulated in the bond that the tehsildar would remain bound by the terms of the *kabuliyat* as long as he did not secure *farad* on making over tehsil after clearing *nikash*, i.e., as long as he did not leave the service. At the end of each year accounts were not taken by the employer in accordance with the terms of the *kabuliyat*, but after more than two years when accounts were taken by a suit more than Rs. 200 were found to have been defalcated by the tehsildar, of which about Rs. 40 were defalcated in his first year of his service. The employers sued the surety and the tehsildar and got decrees against both. The surety appealed to the High Court and on his behalf it was contended that as in consequence of the employers not acting according to the terms of the tehsildar's *kabuliyat*, the tehsildar got an opportunity to embezzle a greater portion of the amount in the second year of his service, the surety was not responsible for the defalcation of the second year. Reliance was placed upon sec. 133 of the Contract Act.

Their Lordships held:—That by omitting to take accounts and the *tahbil* at the end of each year from the tehsildar, the employers did not make any variation in the terms of the contract within the meaning of sec. 133, Contract Act. What was done by the tehsildar was no variation in the terms of his contract but was rather a breach of his contract by which the surety could not be discharged.

*Babus Baidya Nath Dutt and Hem Chandra Mitter* for the Appellant.

*Babu Brajendra Nath Chatterjee* for the Respondents.

*Appeal dismissed.*

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### REPORTS (See Index.)

WE ACCORD A HEARTY WELCOME TO HIS LORDSHIP the Chief Justice, Sir Lawrence Jenkins, who is expected to assume charge of his high office from date.

ENGLISH CRIMINAL STATISTICS FOR 1907 SHOW that Lord Halsbury's short Act for the release of accused persons on bail or on their own recognisance pending trial where there is no reasonable apprehension of their absconding, has been more largely availed of by Magistrates during the year than in previous years. During 1907 the number of persons liberated on personal recognisance with or without sureties were 1,258 whereas the numbers for 1906 and 1893 were 918 and 782 respectively. It must not be supposed, however, that English Magistrates have altogether got rid of their habit of remanding under-trial prisoners to prison for periods extending to four months or more. The English system of circuit and quarter sessions often makes the lot of under-trial prisoners very unhappy. But the Indian Code of Criminal Procedure contains detailed provisions for the correction of the abuses of the English system. All the same magisterial instincts do not seem to be very different in this country and it may safely be said that the general tendency amongst magistrates out here is to remand an accused person to custody even when there is no sufficient evidence forthcoming. It would be useful if the High Court would require magistrates to submit periodical reports of persons remanded to custody during trial and the period of detention in each case.

THE ENGLISH CRIMINAL STATISTICS FOR THE SAME year show a decline in the less serious offences during the year. This decline is noticeable in the number of persons tried, of persons convicted and of con-

victed persons imprisoned. But it is no matter for congratulation that indictable offences of the most serious kinds show, on the contrary, a marked increase. The number of such offences reported to the police is said to be greater than it has been in any year since 1882 with the exception of 1885. Statistics do not, however, point to infallible conclusions. For instance, the revenue returns show a substantial decline in the amount of alcohol consumed during the year but the number of habitual drunkards shows an increase. But when we consider that the statistics only take cognisance of 477 cases, and this number must be a small fraction of those who were not brought before magistrates, it seems probable that this apparent increase may be quite consistent with the general decline of drunkenness. With regard to perjury, although the number of prosecutions declined during the year, the Chief Constable of Liverpool declares that “the disregard of truth exhibited in every Court of Justice is simply shocking, whether in the fabrication of a case or in the effort to get others out of trouble.”

WE INVITE ATTENTION TO THE LETTER WHICH appears at p. clviii of this issue. It raises a question of immense importance to the Brahmo community and indirectly to the Hindu community as a whole. The question is also one of great nicety. The point which the writer of the letter seeks to make out is that in the matter of inheritance of property by the children of a Brahmo marriage, the Indian Succession Act ought to apply. The position which the writer takes up may, to our mind, be best tested by a consideration of the following points. *First*, whether the Indian Succession Act did of its own force apply to Brahmos as a class when it was passed. *Secondly*, if it did not, then has Act III of 1872, which purports to legalise a form of civil marriage amongst persons who do not “profess” the Hindu religion (amongst others), had the effect of extending the application of the former enactment to the case of Brahmos? The answer to the second question seems obvious. So the really important point for consideration is whether at the passing of the Succession Act, the Brahmos were a class to which any of the systems of personal law then in force was applicable (sec. 2), so as to exclude the operation of the Act.

IN THE PRESENT STATE OF AUTHORITIES, THE only decision to which one may look for guidance is *Abraham v. Abraham*, 9 M. I. A. 198. That was a case of converts to Christianity. In that case their Lordships of the Judicial Committee were of opinion that according to Hindu Law, "upon the conversion of a Hindu to Christianity, the Hindu Law ceases to have any continuing obligatory force upon the convert." The question is, does the Hindu Law cease to have any "continuing obligatory force" upon a person who, either for the purpose of his marriage under Act III of 1872 or in all the relations of life, "professes" to be a Brahmo? The case of *Rani Bhagwan Kaur v. Bose*, 7 C. W. N. 895 (P. C.), turned upon the meaning of the word "Hindus" as occurring in the Probate and Administration Act and can hardly be regarded as an authority for the purpose of the present question. But so far as it goes, this case as also the judgment of Sale, J., in *Kusum Kumari v. Satfaranjan*, 7 C. W. N. 784, seems to support the conclusion that a Hindu does not by becoming a Brahmo cease to be a Hindu.

ASSUMING HOWEVER THAT A HINDU BY BECOMING a Brahmo does cease to be a Hindu, the force of the following observation of the Judicial Committee in *Abraham v. Abraham* becomes apparent. "The profession of Christianity releases the convert from the trammels of the Hindu Law, but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interests in, and his powers over property. The convert though not bound as to such matters, either by the Hindu Law or by any other positive law, may by his course of conduct after his conversion have shown by what law he intended to be governed as to these matters. He may have done so by attaching himself to a class which as to these matters has adopted and acted upon some particular law, or by having himself observed some family usage or custom, and nothing can surely be more just than that the rights and interests in his property and his powers over it should be governed by the law which he has adopted or the rules which he has observed."

IT MUST HOWEVER BE BORNE IN MIND THAT IF THE view that by becoming a Brahmo a Hindu ceases to be a Hindu be correct it may be possible to hold that the Indian Succession Act, which was passed after the decision of the Judicial Committee in the above case, applies to Brahmos. The question, as we have said, is one of great nicety, and we agree with our correspondent that an early opportunity should be taken to place it beyond all doubt.

## Correspondence.

[TO THE EDITOR, "CALCUTTA WEEKLY NOTES."]

SIR,—Will you kindly give a little space in your valuable law journal to this letter and give publication to it with a view that the matter may lead to discussion; and I also request you to give your reply to the issues raised:

What is the law that should guide the Brahmos in the matter of inheritance? Whether they should be governed by the rules of Hindu Law or by the Indian Succession Act?

The preamble of Act III of 1872 (Civil Marriages Act) says "whereas it is expedient to provide a form of marriage for persons who do not profess the Christian, Jewish, Hindu, Mahomedan, Parsi, Buddhist, Sikh, or Jaina, religion and to legalize certain marriages the validity of which is doubtful;" And sec. 2 of the Act runs thus.—"Marriages may be celebrated under this Act between persons neither of whom professes the Christian or the Jewish, or the Hindu, or the Mahomedan, or the Parsi, or the Buddhist, or the Jaina religion." Thus the Brahmos have been excluded from the pale of Hinduism, Mahomedanism, etc.

Sec. 2 of Act X of 1865 (The Indian Succession Act) enacts: "Except as provided by this Act, or by any other law for the time being in force, the rules herein contained shall constitute the law of British India applicable to all cases of intestate or testamentary succession." And by the famous Regulating Acts of 1773 and of 1781 and subsequently by Reg. IV of 1793, the use and enjoyment of their own laws and usages were secured to Hindus and Mahomedans in matters relating to succession, inheritance and marriage.

The Hindu Law applies to Hindus by birth who have not openly renounced Hinduism by adopting any other religion. The Buddhists, Jains and Sikhs of India, who had been Hindus, continued to be governed by Hindu Law, notwithstanding their renunciation of the Hindu religion, as there was no civil law intimately connected with their religion; and they are still amenable to Hindu Law. Moreover, they have substantially kept to the Hindu rites and formalities, and when the English came to administer the law in this country they found them generally conforming to the Hindu Law. In the cases of *Bachebi v. Makhan*, I. L. R. 3 All. 55 and *Bhagwan Kuar v. Jogendra*, 30 I. A. 249, 7 C. W. N. 895, it has been established that the term "Hindu" includes Jains and Sikhs. But now there being a distinct law, viz., Act X of 1865, applicable to all in British India, except those who are governed by any special law or enactments, it is expected that the Brahmos professing a different creed and having come into existence after the passing of the said Act of Succession should conform to the provisions of the Indian Succession Act.

The Brahmos cannot claim to be governed by Hindu law on the ground of their being a sect of Hindus like the Sikhs and the Jains, Brahmos unlike the Sikhs and Jains have by Act III of 1872 got a quite distinct kind of marriage. Brahmo marriage, like the Mahomedan, the Christian and the Buddhist marriages, is purely a civil contract, while marriage among Hindus is a religious sacrament and not merely a contract. Polygamy is legal among the Hindus while it is illegal and an offence punishable under the Indian Penal Code among the Brahmos. The Indian Divorce Act is applicable to the Brahmos but divorce is unknown in the Hindu matrimonial law. It is, therefore, a matter of doubt whether the progeny of such a marriage should be governed by Hindu Law in other respects, and my view is that the provisions of the Act X of 1865 (Indian Succession Act), apply to them. I think that this point of law requires to be tested in the highest tribunal of the country.

SILCHAR,  
The 6th April 1909.

JATINDRA KUMAR ROSE, B.L.,  
Plender, Silchar.

## Reviews.

MODERN OR EQUITABLE ESTOPPEL AND RES JUDICATA. In two parts. I. The doctrine of changed situations. II. The conclusiveness of judgments, decrees and orders. By Arthur Caspersz, Esq., B. A., Barrister-at-Law. Third edition. Calcutta. Printed at the Baptist Mission Press and published by S. K. Lahiri & Co. 1909.

We have great pleasure in welcoming a new edition of this work. Although it purports to be the third edition of a book which originally appeared in 1893, it is in reality an entirely new work, specially in its treatment of the first part, which deals with the subject of equitable estoppel. Dealing with this portion first we would indeed be giving a very wrong idea of the work if we merely said that it is an up-to-date and carefully compiled compendium of the codified and case law on the subject of estoppel. So far as the subject comprised in this portion of the work is concerned a work which merely endeavoured to gather together the law from the Codes and the law reports would be both uninspiring and futile. The author very rightly says that the growth of the law of estoppel has suffered in England from the unpopularity of its name and in India from the notion current amongst "unprofessional judges and magistrates," that the Codes are exhaustive as to estoppels and a judge is not justified in departing from the strict letter of the Code. For a recent instance of this attitude of mind, see the observation in *Bibi Asmutunnessa v. Harendra Lal*, 12 C. W. N. 721.

We are glad to find, therefore, that the author has travelled beyond the narrow limits of the Codes and the reports and endeavoured by following the footsteps of Thayer, Bigelow and other writers of repute, to get at the root principles upon which the doctrine of estoppel is, or rather ought to be, founded. Whilst all the cases dealing with the subject of estoppel will be found collected in this work, its great merit lies not in the exhaustive character of this collection, but in the manner in which the cases are sought to be explained and criticised in the light of principles and in the very able and instructive discussion of those principles. As the only treatise in India which really does justice to the subject, it is very much to be desired that it should be widely read by judges and legal practitioners in this country. It will go a long way towards removing the erroneous impression, to which the remarks of some English authors and judges have to no small extent lent colour, that the rule of estoppel is a technical rule which ought to be avoided in the interest of justice. It is no exaggeration to say that after a perusal of the work under review one is disposed to recognise estoppel as the one great living principle of justice which is still found at work in every department

of law in order to secure fair dealing in the ordinary transactions of life. We can say of this work, what we cannot ordinarily do of many other legal publications in India, that lawyers outside India also will find a good deal in the author's treatment of the subject of estoppel which is both original and instructive.

The second part of the work dealing with the subject of *res judicata* does not call for lengthy notice. The author shows great industry and care in compiling this portion of the work. The Indian case law on this subject is very full and it has already been ably handled by an author of great repute, the late lamented Mr. Hukum Chand. The author of the present treatise deserves credit not only for his able analysis of the principle of *res judicata*, but also for the thorough and conscientious manner in which the case law bearing on the various aspects of the subject is digested and presented in this work. There is hardly any question relating to *res judicata* on which the reader will not be able to draw ready and ample assistance from the work. The author has done a distinct service to the profession by his very able and exhaustive presentation of two subjects of such immense importance to the profession through the medium of his re-edited Tagore Lectures.

MAGISTRATE'S HAND-BOOK OF CRIMINAL PROCEDURE. By H. F. Howard, I. C. S., Additional District Magistrate, Backergunge. Calcutta. Published by R. Cambray & Co., Law Booksellers, Publishers, &c. 6 & 8/21, Hastings Street. 1909. Price Rs 2.

This is a small book of about 40 pages which may be read through in half an hour's time. Magistrates starting work as criminal judges will nevertheless find a study of it of lasting benefit to them in forming useful habits in the conduct of their business. The book, notwithstanding its somewhat comprehensive title, does not embody all the directions contained in the Criminal Procedure Code. It merely directs attention to particular provisions of the law which, though important, are occasionally overlooked, and suggests certain details as to procedure and practice into which the Code does not profess to go. Whilst generally approving of these suggestions, we note that some of the author's observations, specially in the paragraphs dealing with the "examination of complainants" (para. 5), "Cross-examination of prosecution witnesses" (para. 24), "Defence witness" (para. 25), are open to criticism. His remarks, for instance, in regard to applications for adjournment by the defence, at p. 27, may easily lead inexperienced magistrates into the belief that there must be some ulterior object behind every such application. None but lawyers can adequately realise the extent to which the defence may be hampered, if

it is not allowed a certain amount of latitude in the conduct of its own case. In the case of Government prosecutions, at any rate, the prosecution as a rule is better represented in Court and the case for the Crown better looked after than the defence, and it is often the latter and not the former which would be in need of indulgences in the magistrate's hands, in order to enable it to present its case properly before the Court. The author is also not quite right in saying that in warrant cases, the defence cannot as a matter of right claim to cross-examine the prosecution witnesses. On the whole, we have no doubt that the book will be found useful.

## Notes of Cases.

### CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

**CIVIL APPELLATE JURISDICTION.** Before MOOKJEE and GARNDIFF, JJ. APPEAL FROM APPELLATE ORDER No. 298 OF 1908. SITAL RAI AND ANOTHER, Judgment-debtors, Appellants v. BABU NAND LAL AND ANOTHER, Decree-holders, Respondents. 1st March 1909.

*Appeal—Bengal Tenancy Act (VIII of 1885), sec. 174, cl. (2)—“Applies,” meaning of—Withdrawal of application under sec. 311, C. P. C. (Act XIV of 1882)—Application under sec. 174, Bengal Tenancy Act.*

On the 8th July 1907, the Respondent decree-holder in execution of a decree for arrears of rent purchased the holding of the Appellant. On the 13th July, the judgment-debtors applied to have the sale set aside under sec. 311, C. P. C. On the 5th August following, they applied under sec. 174 of the Bengal Tenancy Act and asked for leave to make the necessary deposit. The Court directed the money to be received if the application under sec. 311, C. P. C., then pending, was withdrawn. The necessary amount was deposited on the following day. On the 7th August the judgment-debtor applied for leave to withdraw the application under sec. 311. On the 24th August, the Court set aside the sale under sec. 174 of the Bengal Tenancy Act and dismissed the application under sec. 311. The decree-holders auction-purchasers then appealed to the District Judge, who held that an appeal lay to him and that the order under sec. 174 of the Bengal Tenancy Act could not be sustained inasmuch as the judgment-debtors were not entitled to apply for reversal of the sale under sec. 174 after they had applied under sec. 311 to set aside the same sale. The judgment-debtors appealed to the High Court.

*Held*—Whether an order made under sec. 174, Bengal Tenancy Act or under sec. 310A, C. P. C., is appealable, depends upon the circumstances of the individual case before the Court. The test is whether the proceeding is one relating to execution, satisfaction or discharge of the decree between the parties to the suit or their representatives. As the question before the Court was, whether the decree was to be satisfied by the deposit made by the judgment-debtors, under sec. 174, Bengal Tenancy Act, and that question arose directly between the judgment-debtor and decree-holder, the order made by the District Judge was appealable.

The term ‘applies’ in sec. 174, cl. (2) of the Bengal Tenancy Act means “applies and prosecutes.” Hence a judgment-debtor can be allowed after he has made an application under sec. 311, C. P. C., to withdraw that application and to prefer one under sec. 174, Bengal Tenancy Act.

*Babus Mohendra Nath Roy and Chandra Sekhar Prosad Singh* for the Appellants.

*Babus Umakali Mukherji and Raghu Nath Singh* for the Respondents.

A. T. M.

*Appeal allowed.*

**CIVIL APPELLATE JURISDICTION.** Before DOSS and RICHARDSON, JJ. APPEAL FROM APPELLATE ORDER No. 328 OF 1907. SHYAM NARAIN SING, Opposite Party, Appellant v. DOYAL NARAIN SING AND OTHERS, Petitioners, Respondents. Heard, 26th February 1909. Judgment, 19 March 1909.

*Appeal—Civil Procedure Code (XIV of 1882), secs. 244, 310A—Mortgage of judgment-debtor, application by—Sale, setting aside of.*

This was an appeal from an order setting aside a sale under sec. 310A of the Civil Procedure Code. The decree-holder, Appellant, obtained an *ex parte* decree for rent due in respect of a tenure. He sold the tenure in execution and purchased it himself. Thereupon an application was made by the mortgagees of the judgment-debtor and not by the judgment-debtor himself under sec. 310A to set aside the sale.

The first Court dismissed the application, but, on appeal, the sale was set aside.

*Held*—That as the application was made not by the judgment-debtor but by a person who was no party to the suit, the case did not fall within sec. 244, C. P. C., and therefore no appeal lay in the case.

*Moulvis Syed Shamsul Huda and Syed Mahamad Taher* for the Appellant.

*Babus Jogesh Chander Roy and Ganesh Dutt Singh* for the Respondents.

A. T. M.

*Appeal dismissed.*

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### REPORTS (See Index.)

WE LITTLE EXPECTED THAT SIR LAWRENCE JENKINS would throw himself into harness almost immediately after his arrival and take upon himself the onerous task of presiding over the Special Tribunal. It seems that thirteen years of hard work on the Bench of two of the chief High Courts in India has not chilled any of his characteristic energy and love of work that first brought him into prominence amongst the puisne judges of the Calcutta High Court. His elevation to the position of the Chief Justice of the Bombay High Court was very well received at the time; only in professional circles in Calcutta some regret was felt that what was a gain to Bombay was a loss to Calcutta. We, however, ventured to predict then that he would one day return to us as Chief Justice of the Calcutta High Court (3 C. W. N. clxlv). But when his Lordship left India to join the Council of the Secretary of State for India as one of its members we almost despaired of his return. This is, we believe, the first time that a lawyer with such a brilliant record of past service in this country has returned to India as Chief Justice. Sir Lawrence Jenkins' judicial career in the Bombay High Court is still too fresh in the memory of the profession to require any recapitulation.

HIS SERVICES IN THE INDIA COUNCIL SPECIALLY in connection with Lord Morley's Reform scheme are not however so well known. The public will perhaps never know the details of his work in Council but it is a matter of common knowledge in political circles in England that Lord Morley received more substantial help in elaborating the details of his scheme from Sir Lawrence than from any other

single member of his Council. There are still many momentous questions awaiting the solution of the Secretary of State and the Government of India. Amongst them the separation of the Executive and Judicial Functions, the retention or otherwise of coercive measures of legislation in the Statute books, are all matters in which the advice of the Chief Justice will be very helpful to the Government of India and the Secretary of State. And we are sure the Government of India will get the soundest advice and most substantial help from the new Chief Justice whenever they may choose to seek it.

• IT WILL BE A MATTER OF GREAT PUBLIC CONGRATULATION if his Lordship would take personal interest in the administration of criminal justice in this Presidency. There are also many momentous questions connected with the administration of civil justice specially in the Presidency town that should before long engage the attention of the Hon'ble the Chief Justice. The re-organisation and, perhaps, the reconstitution of the Presidency Small Cause Court is a matter in which this city is vitally interested. That the strengthening of the High Court will also engage the attention of the Chief Justice during his Lordship's regime is a matter that needs no repetition. The question of social aloofness which is at present being discussed in the public press is more or less a matter of forced necessity on an active and dutiful judge. From his past career, however, it may be safely stated that Sir Lawrence Jenkins can be relied upon to uphold the best traditions of the English Bench in all matters appertaining to his exalted office. We believe we indulge in no exaggeration in saying that all sections of the Indian and the Anglo-Indian community combine in giving a sincere and hearty welcome to Sir Lawrence and Lady Jenkins.

THE ATTORNEYS OF THE CALCUTTA HIGH COURT have long complained of the Rule of the Calcutta High Court which made it necessary for them to appear at the *viva voce* examination which persons serving under articles of clerkship with a Vakil have to go through prior to enrolment as Vakils, in addition to putting in three years' practice as an attorney of the High Court. Under the Rules, pleaders who have practised in the Mofussil for four

years can apply for enrolment as a Vakil without being required to pass any examination. The High Court has now amended the rules so as to enable attorneys to get enrolled as Vakils after three years' practice. The notification is published in another column. This, we understand, was the rule which originally prevailed in the Calcutta High Court and the notification merely restores it.

IT MUST BE SAID THAT OF THE LEGAL MEMBERS TO the Viceroy's Council that we have had in recent years, Sir Erle Richards has been one of the busiest. The work with which his name will remain long associated is the new Code of Civil Procedure. The other useful measures that the late law member put his hand to and brought to a successful issue are the amendments of the Limitation Act and the Mofussil and the Presidency Insolvency Acts. His name will no doubt also remain associated with a number of ephemeral legislation of a coercive character. But it is a matter of common knowledge that the law member is seldom personally responsible for such measures. He has often to put into shape the demands of the executive Government in these matters. If the Government think that in the interest of the State a Seditious Meetings Act, a Newspapers Incitement Act or a Crimes Act should be passed, the duty of Government in these respects devolves on the law member.

IN HIS OFFICIAL CAPACITY SIR ERLE COMBINED industry with a considerable amount of ability. The measures of legislation for which he was personally responsible were as a rule very well done. It is not known, however, how far he was responsible for the clauses in the Seditious Meetings Act and the Explosives Act and other sister legislation where the onus of proof has in some instances been shifted on the accused. This tendency had as a matter of fact been noticeable in legislative measures of the Government of India even before the last law member's time. As a rule he was a clear and judicious speaker in council. It was well-known that he was a man of broad views and general kindness of manner and on the whole he discharged his duties creditably to himself and to the State.

IN THE FEBRUARY NUMBER OF THE PUNJAB Records at p. 60 is reported a decision of Sir William Clark, Chief Judge, and Mr. Justice Reid, (*Khagewala Nank Das v. Nanak Chand*) which lays down the following proposition of law:—That the property of a joint family governed by the Dayabhaga School is not liable in the hands of a son for debts incurred by his deceased father for liquor supplied to the latter who died before suit.

THE LEARNED JUDGES OBSERVE IN THE COURSE of their judgment: "The pleader for the Respondent contended that sec. 73 of the Contract Act superseded the Hindu Law on the point, but was unable to cite any authority and we have no hesitation in overruling the contention. The parties are bound by the personal law of the debtor, who was governed by the Dayabhaga School of Hindu Law. The rules of that school, relevant to the case, do not appear to differ from the Mitakshara which are set out in sec. 303 of Mayne's Hindu Law, Edition 7; Part V, Chap. IX of Bhattacharya's Hindu Law, Edition 2; pages 449 to 452 of Ghose's Hindu Law, Edition 2; and ample authority from which Jimutavahana and Jaganatha apparently did not dissent, is cited by those commentators for holding that the property in the hands of the Appellant is not liable for debts contracted for liquor supplied to his father. His personal liability is equally regulated by these authorities. Had the suit been instituted before the father's death, the Respondent might have been in a stronger position, but it is unnecessary to discuss this aspect of the case, the suit having been instituted after the father's death."

THE ABOVE OBSERVATIONS OF THE PUNJAB CHIEF Court remind us of a complaint which is frequently made, not without reason, that the opinion of the Courts of law in India on questions of Mitakshara law has been often coloured by the judges' predilection for the Dayabhaga system due to an earlier study of the Dayabhaga authorities. But the case just noticed seems to illustrate an opposite tendency. We have very grave doubts as to whether the decision would have been the same had the case come up before the Calcutta High Court.

IT IS NO DOUBT TRUE THAT KATYAYANA'S TEXT, in so far at any rate as it discountenances payment by sons of "sums due by their father for spirituous liquor," is approved of by authorities of both the Mitakshara and the Dayabhaga schools alike. But what the learned Judges of the Punjab Chief Court apparently overlook is that the obligation to pay the father's debt which the Hindu law seeks to impose upon the son is a pious obligation, which arises independently of assets left by the father. It is no doubt true that the High Courts of Bengal, Allahabad and Madras have thought fit to limit the operation of this rule by confining the legal obligation to ancestral property coming into the son's hands. But there can be no question that the opinion of the Bombay High Court which favoured a strict enforcement of the rule, that is to say, against the son personally, was more in consonance with the authorities than the views of the other High Courts.



SIDE BY SIDE WITH THE ABOVE RULE, WHICH HAS been utilized by the High Courts in India, with the approval of the Privy Council, to break in upon the absolute inalienability (in the absence of family necessity) of joint family property to which a strict adherence to the Mitakshara theory of the joint family would have inevitably led them, is the rule which the Courts in India have never hesitated in applying to persons governed by any form of the Hindu Law, that property which was in the absolute disposal of the father in his life-time would be available for paying off his legal debts in the hands of his son or any other heir or legal representative. This rule is well recognised in English law, and is also supported by high authority of purely Hindu origin. "Assets," says Mr. Colebrooke, "are to be pursued into whatever hands. See Narada, cited by Jagannatha, 1 Dig. 272. And innumerable other authorities may be cited were it requisite in so plain a case." (Mayne 7th Edition, para. 328).

WHEN THE FATHER IS ALIVE, THERE IS, IN A Dayabhaga family, no joint family property, strictly speaking, in the sense in which the term is understood in Mitakshara law. [See *Dharma Das v. Amulya Dhan*, 10 C. W. N. 765 and *Bejoy Krishna v. Ashutosh*, 13 C. W. N. 396]. The Dayabhaga father has the same absolute disposing power over ancestral property, as a Mitakshara father has over his self-acquisitions. A debt which was legally enforceable against the father in his life-time would be enforceable under the latter rule against property in the son's hands over which the father in his life-time had absolute disposing power, whether it be self-acquired property of a Mitakshara father or ancestral property left by a Dayabhaga father.

## STATUS OF WOMEN IN HINDU LAW.

### II.

In studying the limitation upon a woman's rights of property in Hindu law we must never forget that Hindu lawyers were more concerned in bringing out the obligations incident to property than its rights. More perhaps than any other system of law, Hindu law was concerned in keeping the social order intact. No rights were conceded to men which would be likely to go against the settled order of things which lawgivers regarded as a divine dispensation, and wherever there was the slightest risk of any right being directed against the social order it was hemmed in with such limitations as would reduce the risk of its upsetting society to a minimum. By far the most important right and one involving the greatest risks is the right of property and in connection with this we find the greatest number of limitations placed on men as well as women. The Hindu

lawyers were not content merely to lay down the moral precept that property was for the purposes of Dharma, which was very nearly identical with the maintenance of the settled order of things, but also laid down positive legal restrictions on the right. The provision by which every son of the family becomes entitled by birth to a share in the family property and the elaborate provisions for the maintenance of persons not entitled to inheritance were some of the restrictions placed on the absolute power of disposal over property. Besides these the co-owner of an undivided property was not regarded as having any rights over any part of that property except using it for his benefit or perhaps managing it with prudence. Power of alienation was very restricted, so much so that if property is described in the words of Savigny as "*eine totale Herrschaft über eine Sache*," the undivided Hindu had no property in any part of the ancestral property prior to partition. Even in self-acquired property, if it was ~~not~~ acquired without any assistance from family property, the right of the acquirer was very limited. Judged by the interpretation placed by Vijnaneswara upon Yajnavalkya's text on self-acquired property, it would seem that there was the strongest tendency to emphasise any the slightest assistance rendered by ancestral property or family connection, so as to make almost any property ostensibly self-acquired really a property obtained by use of family property or connection. So that in Hindu society the right of absolute property receives a very unwilling recognition even in the case of males.

In considering the limitations on a woman's rights in property we have further to consider the anomalous position of females in almost all societies—a position that has greatly affected her rights in every system of law. In her father's family she did not stay. Naturally in all societies where family is a valued institution her father's property could not pass to her. In her husband's family, too, she was not regarded as a separate person but as more or less merged in her husband. This was a necessary theory, for else marriage would bring into the family partnership persons who were not born in the family and who, all the moral injunctions notwithstanding, might pass out of the family on the death of her husband. Their inclusion, where the taking of more than one wife is permissible, would operate to the great prejudice of the unmarried.

From such considerations the usual rule seems to have followed which excluded females from inheritance in early society even when the man's quasi-proprietary right over the woman had ceased to be recognised. Later on females were admitted to rights of property but their gradual admission has been very likely due historically to adventitious circumstances. The texts cited in the Mitakshara (II 136) supporting the theory which it disproves,

that women become entitled to property through their sons seems to point to the historic truth that where females get in it is only in virtue of their likelihood of having sons capable of inheritance. This point of view has been very elaborately worked out by Sir Henry Maine and it is unnecessary for our present purposes to more than allude to it here. It may however be pertinent to observe that this principle does not apply to the six kinds of *stridhan* as mentioned by Yajnavalkya which were perhaps the only property that women were first permitted to possess. The recognition of their right to hold other property also, come by in ways which are recognised as valid modes of acquisition for males, seems to be a later institution and it is in respect of this property alone that it may be said that women take it by virtue of the possibility of their bringing forth children.

Whatever may be the history of the acquisition of proprietary rights by females, and whatever the motive which actuated ancient lawgivers to recognise the woman's rights, this is sure that in developed Hindu jurisprudence as represented by the Mitakshara, the wife, the daughter and other females are held to have the right to acquire property on their own account not only in the modes prescribed for the acquisition of *stridhan* but also in all the other recognised ways of acquisition for males such as *रिक्च*, *क्रय* *संविवान* &c. Their right to a share on partition is generally recognised the wife's share being held to be equal to that of sons. The widow inherits and so does the daughter and all this not because she might bear a son by *niyoga* or affiliate one by adoption but in her own right and by virtue of her affinity. This point of view has been somewhat elaborately worked out by Vijnaneshwara in his discussion on the wife's right in Yajnavalkya's text (Mitakshara II, 136) and he certainly seems to have given an exposition of the view of Hindu law in its most developed stage.

There are several shades of opinion with reference to the status of women in respect of property. It is extremely doubtful whether limitations on her rights were originally meant to affect all women owners of property, but that in all schools of law the widow's rights are subject to these is without doubt. We shall take the limitations on a widow's right therefore as typical of restrictions on women's powers. With reference to these there are at least three distinct shades of opinion in authoritative text books in different parts of the country. One view excludes the widow altogether from property beyond a certain small amount of *stridhan* and makes her entitled only to maintenance or to inheritance to the divided husband only if the property is small. A second school recognises her rights to inherit property as well as to acquire it by other means and gives her certain restricted rights in the matter

of binding the heirs by alienations. Yet another school, while recognising her rights to inherit, makes a distinction between *stridhan* technically so-called and property inherited by females. With reference to the first the widow is given the fullest rights of enjoyment and alienation but with reference to the next her rights are placed under restraints.

These restrictions on the alienation and disposal of property acquired by females seem historically to be a later addition to the property legislation and their extent is seen to be increasing with time. Thus the Mitakshara beyond recognising the general subjugation of women to her guardians in pursuance of the text *रक्षेत् कर्त्ता पिता* &c. and the further limitation of a woman's estate in time to the period of her life, has nothing more to say. But this restriction the Mitakshara places on all property in the hands of females and makes no distinction between the technical and the derivative meanings of *stridhan*. Later commentaries go on increasing the restrictions on property inherited by females. The Dayabhaga lays down the largest amount of restriction on the woman's estate in inherited property though it gives her an absolutely free hand in the disposal of *stridhan*.

So far as the plenary rights over *stridhan* is concerned it may be observed that they are a very late growth in their present shape in Bengal. In ancient Hindu law *stridhan* could not exceed the petty sum of two thousand *panas*. It was in consideration of this smallness of amount perhaps that a woman's right over her *stridhan* was recognised as large enough and this conception stuck on even when large *stridhan* properties came to be recognised.

With reference to the restrictions themselves it would be enough for our purposes to refer to the Dayabhaga law on the subject. Jimutavahana says.

‘पत्नी च भर्तृधनं मुञ्जीतेव न तु तस्य दानाधान-विक्रयान् कर्तुमर्हति । तदाह कात्यायनः, “अपुत्रा शयनेभर्तुः पालयन्ती गुरी स्थिताः मुञ्जीतभिरणात् चान्ता दद्यादाः कर्त्तव्याः ।” \* \* \* अतः पत्नी दुहितरसंख्यादिना ये पूर्वपूर्वस्याभावे परभूताधिकारिणी निर्दिष्टास्ते यथा पराधिकारप्रागभावे गृहीतुस्तथा जाताधिकारायाः पराधिकारप्रत्यक्षेऽपि भोगावशिष्टं धनं गृहीतुः । \* \* \* तथा दानधनं “स्त्रीणां स्वपतिदायस्तु उपभोगकक्षकृतः । नापहारं स्त्रियः कुर्यात् पतिदायात् कथञ्चन ।” उपभोगीऽपि न स्वस्वपरिधानादिना किन्तु स्वशरीरधारणेन पत्युरपकारकलात् दुःखधारणोचितोपभोगाभ्युत्थानं एव च भर्तुरीदं देहिकक्रियायर्थं दानादिकल्प्यतुम् । \* \* \* अतएव वत्पतिशक्तौ प्राधान्यमनुमत्तं तवाप्यशक्तौ विक्रयमपि ।’

“The wife should enjoy the husband's property but should not make a gift, mortgage or sale of the property. So, says Katyayana, ‘The sonless widow faithful to her husband's bed and residing in her

father-in-law's house should enjoy [the property] till death and after her those entitled to inherit shall take.' So those heirs who are stated by the text *पत्नी इति* &c. as taking one after another, shall take, on the termination of the right of the widow, the residue of the property which remains after her enjoyment, just as they would take if there was the absence of a widow's estate intervening. So, too, in *Danadharmā*: 'For wives, their husband's property is for enjoyment only. Wives should never alienate anything out of the husband's property.' Enjoyment, too, is not by wearing fine cloth and the like but by keeping herself alive. Enjoyment such as is necessary for the maintenance of life is prescribed because it would be for the husband's [spiritual] benefit. So for the purposes of the obsequies of the husband even gift &c., is permitted. \* \* \* So, too, if insufficient for maintenance, the property may be mortgaged and if that even does not suffice it may be sold."

Here we have a body of rules of the utmost stringency. Much of it however is mere moral precept framed perhaps with an extravagant apprehension of possible unchastity. So far as it is positive law the rules may be brought down to this:—

1. The wife has full powers of enjoyment during her life of all the assets of her husband's property without question from any body.
2. She has no power to sell, mortgage or make a gift of such property.
3. She can make such gift, mortgage or sale if there is sufficient necessity for her own maintenance and for the spiritual benefit of her husband.
4. The heirs of her husband take after her only so much of the property as is left after her full enjoyment for life.

Now, remembering the object of all property legislation by our jurists to be the maintenance of the social order intact by maintaining the integrity of the family, and also the fact of the anomalous position of women, it is easy to see that all these rules and restrictions have reference to the supposed intellectual incapacity of the woman and her natural tutelage to men. A widow is regarded as having right of property. In respect of *stridhan* property she is generally subordinate to her husband's authority so long as the husband lives but after that she is free to do as she chooses. Even during coverture however her ownership is distinct. This was because the *stridhan* was an outgrowth of *Saudayika* property which could not exceed two thousand *pāns*. The same liberty could not be given to her with reference to other property, and notably ancestral property, for it then ran a great risk of being wasted or of passing out of the family. Nor could she be made subject to anybody's control in this matter except that of the husband for that

would make the right of property itself meaningless. She is therefore given full powers of enjoyment of the family property with only such restrictions as would make it impossible for her to waste it or pass it out of the family. She is free to enjoy but not to bind the next heir by any alienations. Yet she can make alienations to bind her heirs like any full owner. Only there ought to be some guarantee, in view of the low estimate in which her intelligence and moral sense is held, that she has not made the alienation recklessly that she has made it for some sufficient necessity.

Except for this the woman is in all respects looked upon as a full owner. She is held entitled to an equal share with her sons on partition, though in view of her weak powers and the great risk of her producing disruption in the family she is not recognised as entitled to demand a partition. The decision of the Privy Council, that she can transfer absolute interest in her property with the consent of the presumptive reversioner for the time being is also strictly consonant with the principles of Hindu law; and it may be justified not only on the somewhat far-fetched ground that the widow may renounce her right and thus make the reversioner himself the full owner at the moment of transfer, but on the ground that the assent of such reversioner who is a man with a stake in the property is evidence of the *bona fides* and the prudence of the transaction. The restrictions on a woman's rights of property would thus seem to be only limitations imposed in view of her presumed incapacity for judgment and decision which requires protection in her own interests and in the interests of the family.

We have assumed in the above discussion, what has been held by our law Courts, that every property inherited by women is subject to the same restrictions as a widow's estate. This point is not free from doubt, but a discussion of the question is beyond the scope of the present article. The restrictions on the rights of other female heirs are if anything less stringent. So it does not affect the general argument put forward above.

We have not sought to explain the exclusion of certain females from inheritance. This is certainly due to historical causes. The general rule of old was to exclude women. *Exclusion* is an exceptional circumstance which has called forth a great deal of discussion by our jurists. In the attempts to justify the inclusion however later jurists consistently affirm that every particular female heir gets in by virtue of her kinships and affinity and not in virtue of another's right. The exclusion of women or their postponement to males was a matter of positive law as embodied in the *Smṛiti* and *Smṛiti* and never entered into the Hindu theory of law.

The result of the whole discussion would seem to be that Hindu law in so far as it is a philosophical system does not look upon the rights of women

in themselves with a jealous eye. All restrictions upon her rights as compared with those of males are due to a belief in their intellectual and moral incapacity. A recognition of this truth may not be without some interest to the practical lawyer. It is not possible now that our Courts will begin to reconsider anew the points of Hindu law relating to females which have been laid down by judicial decision. Still it may not be impossible to bring about a slow recognition of this principle by our Courts. Such a recognition would seem to have most beneficial consequences. For, once it is granted that a woman's disabilities have the obvious object of protecting her from abuse of her natural powers our Courts should be justified in interpreting these limitations with a great deal of elasticity. If the object is gained then the rules laid down for its attainment need not be strictly followed. That being so, in all cases of the exercise of a woman's power our Courts would be justified in overlooking the statutory limitations on her rights and in enquiring how far the power was properly and judiciously exercised with due regard to the general principles of Hindu law and social organisation and to the interest of the woman and her family. If the exercise of powers in excess of those given by law is found to have been properly made, our Courts might hold work done by such exercise to be valid although irregular. On this principle, administration of Hindu law will become more elastic and rational and will help greatly the work of emancipation of our women.

If it should at any time become desirable, as it certainly is not now, to replace the Hindu law as administered by our Courts by statute law as some jurists dream, this consideration should greatly influence the legislation on woman's rights.

N. C. S.

## CRIMINAL CASES OF 1908.

The present Article is in continuation of the series of Articles written by the Author for the *Calcutta Weekly Notes* commencing from 1898 and dealing with the Criminal Law in all its branches as discussed and determined in the rulings of each year. The principle followed in former Articles of formulating the propositions established by each ruling and discussing the entire law on the point or points involved has also been adopted in the present instance. The matter is dealt with in four general divisions. I Criminal Procedure Code. II Penal Code. III Evidence Act, and IV other General and Local Acts.

### I. CRIMINAL PROCEDURE CODE.

**DEFINITIONS.**—[*Complaint*]. A report by an amin, deputed to demarcate a boundary, to the Collector that the accused had destroyed the pillars he had erected and carried away the materials, whereupon the Collector directed him to look up the sections

of the Penal Code applicable to the case and to put up the case before a Subordinate Magistrate for orders, was held not to be a complaint (*Bansi v. Emperor*, 12 C. W. N. 438, 440). The essence of a complaint is the intention to set the criminal law in motion. Where the intention is not to do so, but merely to bring certain facts to the notice of the Magistrate by way of information, there is no "complaint" (*Rayan v. Emperor*, 26 Mad. 640; *Malappa v. Emperor*, 27 Mad. 127; *Bhaman v. Haluman*, 6 C. W. N. 926; *Jagbundhoo v. Emperor*, 30 Cal. 415; *Re Harilal*, 22 Bom. 949, 956; see also 5 Bom. H. C. R. 85). A complaint need not be in any particular form. An application impugning a police report and requesting the Magistrate to send for witnesses and examine them is a "complaint" (*Queen-Empress v. Sham*, 14 Cal. 707; *Re Russick Lal*, 7 C. L. R. 382, 384; *Re Sahiram*, 5 C. W. N. 254; *Lalji v. Giridhari*, 5 C. W. N. 106, 107; *Sarat v. Aghore*, 4 C. W. N. ccxxi; *Emperor v. Jung*, 10 C. W. N. cxiii; *Jogendra v. Emperor*, 33 Cal. 1; *Apurba v. Emperor*, 35 Cal. 141). A yadast by a revenue officer to a Magistrate charging certain persons with disobedience to a summons is a "complaint" (*Queen-Empress v. Meenu*, 11 Mad. 443), but the examination of a person against his will in departmental enquiry into charges of bribery against a public servant by the person examined is not (*Queen-Empress v. Karigowda*, 19 Bom. 51).

[*Muktear*].—It has been held by a Full Bench in Allahabad that a muktear is not entitled to practise generally and as of right in the Criminal Courts, but only with permission in a particular proceeding (*Re Anant*, 30 All. 16); but the Court should bear in mind that there are many cases when the difficulty of obtaining the services of an advocate or pleader will be very great and practically impossible (per *Richards, J.*, at p. 69). In *Abbas v. Queen-Empress*, 25 Cal. 736, 741, a muktear was held to come within the definition of a "pleader" within the Code for the purpose of sec. 126 of the Evidence Act. This decision, at least with reference to the question under sec. 126, is extremely questionable: see *Queen v. Chandra Kant*, 1 B. L. R. Cr. 8. In Bombay and Madras it was held that an appellant had the right to appear and be heard by a muktear under sec. 278, Code 1872, (now sec. 421) [6 Bom. 14 and 1 Mad. 304]. The precise question involved in the Allahabad decision did not arise in 7 C. W. N. 524, but the case is instructive to muktears.

**DUTY OF LOWER CRIMINAL COURTS.**—[*Decision of points of law*]. The Magistrate should himself decide a point of law arising in the case, and not adjourn the trial to enable the parties to obtain a decision on it from the High Court (*Mohesh v. King-Emperor*, 12 C. W. N. 604). The High Court does not entertain any abstract question of law (20 Cal. 478, 479; see 8 Mad. 18) and very wisely so.

In *Kochal v. Romesh*, 35 Cal. 795, 798, Rampini, J., declined to answer the legal conundrums suggested to the High Court by the innocent but inquisitive Magistrate.

E. H. MONNIER.

(To be continued.)

## Review.

THE TIME LIMIT ON ACTIONS, being a treatise on the Statute of Limitations and the Equitable Doctrine of Laches. By John M. Lightwood, M.A., of Lincoln's Inn, Barrister-at-Law; formerly Fellow of Trinity Hall, Cambridge. Author of "Possession of Land." London: Butterworth & Co., 11 & 12, Bell Yard, Temple Bar, Law Publishers. 1909.

The concise and thoroughly intelligent treatment of the English law of limitations and the doctrine of laches to be found in the present work will be greatly appreciated. The Indian law of limitations as embodied in the Indian Limitation Act and the case-law that has grown up around it offer many points of contact with the English law, and upon these points, the present work will be found of great use to the Indian lawyer. For instance, the portions dealing with Adverse Possession of land generally (Ch. I, sec. 1) and with reference to Present and Future Interests (Ch. I, secs. 3 and 4) and as between Landlord and Tenant (Ch. I, sec. 8) and notably the section dealing with "Possessory title" (Ch. I, sec. 9) have as much application to this country as to England. The author's analysis of the doctrine of laches and acquiescence (Ch. V, secs. 1 and 2) will also be greatly appreciated no less for its lucidity than for the soundness of the conclusions drawn by him from the cases. The limitation provided in the Public Authorities Protection Act deservedly comes in for separate treatment, and this portion also will afford valuable assistance to practitioners in this country. In dealing with the subject of Acknowledgments the author refers to the Privy Council judgment in the recent case of *Moniram v. Seth Rupchand*, which he found in the *Times Law Reports*. English lawyers generally seem to be unaware that the English Law Reports (Indian Appeals series) report all the decisions of the Judicial Committee in Indian cases. This is regrettable. In an appendix the author collects all the statutory enactments in force in England relating to limitation of actions, for, it may be noted, in England there is no consolidating statute of limitation as in India. After going through this volume and comparing with it our experience of the working of the Indian Limitation Act, we find ourselves fully in agreement with the author in thinking that the English statutes also might with advantage be consolidated and harmonised into one single enactment.

## Notes of Cases.

### CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before CASPERSZ and RYVES, JJ. CRIMINAL REVISION No. 172 OF 1909. GAJENDRA NARYAN MAITY, Petitioner v. DARIK NATH PAL, Complainant, Opposite Party. 12th March 1909.

Judgment—Not in accordance with law—Criminal trespass.

One D lodged a complaint against the Petitioner alleging that the Petitioner had trespassed on the land in the possession of the complainant and prevented him from ploughing the land and drove him away from the field. The trying Magistrate in an elaborate judgment found the Petitioner guilty under sec. 447, I. P. C., and sentenced him to pay a fine of Rs. 20, in default 2 weeks' rigorous imprisonment; the concluding portion of the judgment was in these words:—"Accordingly under all the circumstances mentioned above I hold that the accused encroached upon it (the land) illegally. The encroachment amounted to criminal trespass which has certainly annoyed the complainant and done mischief to his land inasmuch as he has not been able to cultivate it this year."

The Petitioner appealed to the District Magistrate who dismissed the appeal by a judgment which ran thus. "I have heard muktears on both sides. The reasons which the Deputy Magistrate gives for believing the *bund* to be an encroachment appear to me sensible; he is in agreement with the officer who held the local investigation. I see no reason for differing from the conclusion arrived at by the Deputy Magistrate. The appeal is dismissed."

The Petitioner moved the High Court and obtained this rule.

Their Lordships observed:—

"The District Magistrate's judgment does not show either that he had read or considered the evidence or that he was satisfied that the Petitioner had committed a criminal as distinguished from a civil trespass. His judgment ought to have been fuller and it ought to have shown that he had duly considered the arguments placed before him by the muktears on both sides. We accordingly make the rule absolute and direct that the District Magistrate do re-hear the appeal according to law."

Babu Manmotha Nath Mukherji for the Petitioner.

Babu Sajani Kanta Singha for the Opposite Party.

B. C.

**CIVIL APPELLATE JURISDICTION.** Before BRETT and CHITTY, JJ. APPEAL FROM APPELLATE DECREE No. 1096 OF 1907. BROJOKISHORI BAISHNAVI, Plaintiff, Appellant *v.* MIJAN BISWAS AND OTHERS, Defendants, Respondents. 3rd March 1909.

*Lis pendens in mortgage suits decided ex parte—Purchaser of mortgaged properties after mortgage decree but before mortgage-sale, the right of.*

The Plaintiff's mother got an *ex parte* mortgage-decree against three brothers, Safatulla, Ebratulla and Faratulla and in execution of the decree she sold the mortgaged properties and herself became the purchaser. There was another brother of the judgment-debtors, named Ofatulla, who lived separate in the house of his father-in-law for about 30 years. They had also 2 sisters who lived in their husbands' houses. It appears that after the mortgage-decree was passed but before the sale in execution of the mortgage-decree took place, Ofatulla, Faratulla and the two sisters sold their shares in the mortgaged properties to the Respondents who on the strength of this sale dispossessed the Plaintiff of the properties. The Plaintiff sued the Respondents making the four brothers and the two sisters *pro forma* Defendants. The Munsif held that Ofatulla and the two sisters had no interest in one of the two mortgaged properties but they had interest in the other property which was ancestral. As regards the share of Faratulla the Munsif held that though a mortgage-decree was obtained against him *ex parte* and he transferred his share to the Respondents after that decree, still the Respondents' purchase was not affected by *lis pendens* under sec. 52 of the Transfer of Property Act, because the mortgage-suit was disposed of *ex parte* and therefore it was not contentious. He relied upon I. L. R. 31 Cal. 658 and I. L. R. 27 Cal. 77.

On appeal the Subordinate Judge held that *lis pendens* did not apply to a mortgage-suit. He also relied upon the case in I. L. R. 31 Cal. 658. The Plaintiff appealed to the High Court and on her behalf it was contended that the case in I. L. R. 31 Cal. 658 was wrongly decided and it has been practically overruled by the Privy Council decision in 11 C. W. N. 561. Reference also was made to I. L. R. 29 Mad. 426, F. B., and I. L. R. 31 Bom. 393 for the meaning of "contentious suit." It was also contended that a mortgage-suit did fall within the purview of sec. 52, Transfer of Property Act, and the case in I. L. R. 31 Cal. 658 was opposed to I. L. R. 26 Cal. 966 and 2 Cal. L. J. 288. Alternatively it was urged that even if *lis pendens* did not apply, the Respondents being purchasers subject to mortgage-decree had lost their rights of redemption after that decree had been made absolute under sec. 87, Transfer of Property Act.

*Held*—That as the Respondents purchased the share of Faratulla in the mortgaged properties

after the mortgage-decree, the Respondents had no higher right than that of Faratulla as against the Plaintiff. The Respondents could have redeemed the mortgage before the final decree but as they did not do so their right of redemption had been extinguished.

*Semle*—That a suit though decided *ex parte* might be "contentious" within the meaning of sec. 52 of the Transfer of Property Act and that the doctrine of *lis pendens* applies to mortgage-suits.

Babu Brajendra Nath Chatterjee for the Appellant.  
Babu Biraj Mohun Mozumder, Moulvis Shamsul Huda and Nuruddin Ahmed for the Respondents.

*Appeal allowed:*  
*Lower Court's decree modified.*

**CIVIL APPELLATE JURISDICTION.** Before HOLMWOOD and SHARFUDDIN, JJ. APPEAL FROM APPELLATE DECREE No. 1459 OF 1907. HARA GOBINDA SAHA, Plaintiff, Appellant *v.* PURNA CHANDRA SAHA AND OTHERS, Respondents. 19 March 1909.

*Benamidar—Lending money from joint fund—Mortgage.*

The Plaintiff lent Rs. 105 to the Defendants upon a simple mortgage bond. The defence was that the Defendants borrowed the money from a money-lending firm which consisted of the Plaintiff's father and his uncle, that this firm was in the *benami* of the Plaintiff and that the Plaintiff had no right or ownership in the money borrowed under the mortgage bond.

*Held*—That the Plaintiff was not a *benamidar*. He was perfectly at liberty to use the funds in his hands, whether they belonged to the joint family or anybody else.

A person who enters into a contract with another who lends him money and in pursuance of that contract with another who lends him money and in pursuance of that contract gives him a lien on his own immoveable property, cannot be heard to say that somebody else supplied the funds which were lent to him.

Babus Mohendra Nath Roy and Krishna Prosad Sarbadhikary for the Appellant.

Babu Mohini Mohun Chuckerbutty for the Respondents.

A. T. M.

*Appeal allowed.*

### High Court Notice.

The following rule made by the High Court of Judicature at Fort William in Bengal, is published for general information.

HIGH COURT,	} By order of the High Court, A. W. WATSON, Offg. Registrar.
The 15th April 1909.	

It is ordered that the proviso and the note attached to Rule 23, Part V, Chap. XVI, p. 105 of the "Rules of the High Court, Appellate Side," published in Part I, pp. 1523 to 1583, of the *Calcutta Gazette* of the 19th November 1902, be, and the same are hereby, cancelled.

The 23rd March 1909.

# THE Calcutta Weekly Notes.

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MR. JUSTICE STEPHEN WILL PRESIDE OVER THE second Calcutta Criminal Sessions which will commence sitting from date.

IN REPLY TO THE FAREWELL ADDRESSES PRESENTED by the Vakils, Sir Francis Maclean and Mr. Justice Mitter both referred to the arrears on the Appellate Side of the High Court. The accumulation of arrears is noticeable in both the civil and the criminal business. There can be no doubt that the appointment of an additional Judge which has been asked for is urgently needed to grapple with these arrears. The number of Judges should be such as to enable the Chief Justice to constitute separate Benches for all the four groups, viz., the Presidency, the Burdwan, the Patna and the Rajshahye, sitting simultaneously throughout the year, or else the civil business on the Appellate Side is sure to suffer.

THE LIST OF BUSINESS PENDING BEFORE THE CRIMINAL Bench at the present moment has attained portentous dimensions, and this notwithstanding the complaint which is frequently heard that prisoners serving out short terms of imprisonment do not, unless they have the means of engaging counsel or senior Vakils, often get a chance of moving the High Court before their terms expire. It is also often the case that when they do succeed in moving the Court and obtaining a rule in good time, unless at the same time they are let out on bail, by the time the rule comes on for hearing, they have probably already served out the whole or a

considerable portion of their term. The proposed constitution of a second Criminal Bench which will commence sitting immediately on the disposal by the Special Tribunal of the Barrah Dacoity case, to dispose of the criminal appeals, will no doubt afford substantial relief. It has now come to be the regular practice of this Court to constitute a second Criminal Bench whenever the accumulation of arrears has been, as at this moment, very heavy. But this will be recognised as only a more or less makeshift arrangement which does not really go to the root of the evil. Some more satisfactory arrangement for the hearing of motions and revision cases promptly and expeditiously is urgently needed in the interest of justice as well as quick despatch of business.

THE MARCH NUMBER OF THE *Green Bag* publishes an address delivered by the President of the American Bar Association before the Oklahoma State Bar Association under the heading "Conservatism in Legal Procedure." The address contains some very remarkable criticism of the system of administration of justice obtaining in the American States. It would appear from the instances cited in this address that the love of technicalities enters into the decision of the Courts in some of the States to a far greater extent than would be tolerated either in England or in this country. The learned President quotes the following observations from the judgment in *State v. Dreher*, 137 Mo. 11, where on an appeal from a conviction of murder and sentence of death on the ground that the negligence of counsel was such as to vitiate the trial, the Supreme Court is reported to have said:

The neglect of an attorney is the neglect of his client in respect to the court and his adversary. The decisions are too numerous to cite; but their uniform tenor is to the effect that neither ignorance, blunders nor misapprehension of counsel not occasioned by his adversary is ground for setting aside a judgment or awarding a new trial. The rule is founded upon the wisest public policy. To permit clients to seek relief against their adversaries upon the alleged negligence or blunders of their own attorneys would open the door to collusion and would lead to endless confusion in the administration of justice. The business of the courts cannot be conducted on any other terms than that parties must be held by the acts of their attorneys in their behalf in causes in which they are authorized to appear, and in the absence of fraud, leaving the client to his remedy against the attorney for his negligence.



THE AUTHOR OF THE ADDRESS DRAWS THE FOLLOWING moral from the above and similar instances of a failure of justice due to the shortcomings of counsel: "The litigant untrained in the law and unused to its mysteries, must bear the burden of the blunders of the Court and counsel, grievous as these may be. For the mistakes of the Court he may have a costly and partial redress by appeal to a higher tribunal, whilst for the mistake of the counsel he has, in the case itself, no redress at all, and outside the case none that is greatly worth while." And he pleads that the "law which a man is held to know should be within the reach of his understanding. The procedure to be followed in the assertion and vindication of his rights should be plainly marked out and easy to be pursued, if not by himself, at least by those who are accredited as competent to guide them. There should be in it nothing savoring of the mystery of a craft." He adds further that the substantive law is fairly free from this reproach but that the same cannot be said of the formal law and for this the lawyers are specially responsible.

THE LEARNED PRESIDENT THINKS THAT IN THIS respect England stands far in advance of America, and endorses the remark of Mr. Odgers, when speaking of reforms in law accomplished in England during the latter part of the last century: "No honest litigant of ordinary sagacity can now be defeated in an action by any mere technicality, or lose his case through any mistaken step or accidental slip." Litigation there has ceased to be what in the language of Lord Brougham it was in 1800—"a two-edged sword in the hands of craft and oppression." The eulogy which he pronounces on the English system may not all be fully deserved. The cry for legal reform has not yet ceased in England, nor is it in the best interest of that country that it should cease. The millenium has not been attained either in that country or any other, whether it be in all that concerns law and legal procedure or any other matter. But it may be fairly asserted that no Court in England and still less in India will perpetrate such a thing as this:

"In *Taylor v. State*, 5 Texas App. 569, decided in 1879, the jury found the defendant "guilty" and fixed his punishment at imprisonment in the penitentiary for three years. The court said that as a general rule "neither bad spelling nor ungrammatical findings of a jury will vitiate a verdict when the sense is clear." And after declaring this common sense rule they hold the verdict bad because "guilty" is neither synonymous nor *idem sonans* with "guilty."

AGAIN IN *Woolridge v. State*, 13 TEXAS APP. 443, decided in 1883, the verdict was, "We the jur

find the defendant, Ben Woolridge, guilty of murder in first degree and assess the punishment at death."

Upon this verdict the Court solemnly observed:

It is to be particularly noted that here we have no case of misspelling a word; the word used is "fist," as well known to the English language as any other word in daily common use. It is further to be noted that this word "fist" is not pronounced, and cannot by any contortion of pronunciation be made to sound like the word "first"; and consequently the doctrine of *idem sonans* is not applicable and must be eliminated from the discussion.

Have the jury found the defendant guilty of murder in the first degree? To enable us to so hold, we must strike from the verdict a word which they have plainly spelled—a word in everyday use in our language and substitute in its place another and entirely different word which we only infer they must have intended instead of the one they have used. Can we do this? If so, . . . then why have the inestimable right of trial by jury at all? If the court can substitute a verdict which the jury has not found, or find one where they have found none at all, then why have a jury? Why not let the court find the entire verdict without the intervention of a jury? . . .

#### SEC. 13 OF THE LEGAL PRACTITIONERS ACT.

The interpretation of sec. 13 of the Legal Practitioners Act (XVIII of 1879) has been the subject of not very many decisions of the High Courts. But on it depends the security and well-being of the bulk of the legal practitioners in this country. The recent decision of the Madras High Court in *re* the conduct of certain vakils of Tinnevely (South India) adds one more to the already existing conflicting decisions. The said vakils were charged with circulating seditious leaflets and organising the meetings for the lectures of Mr. Chidambaram Pillay, since convicted of sedition by the Sessions Judge of Tinnevely, which conviction was also upheld by the Madras High Court. The Public Prosecutor asked that the Madras High Court may take action against them under the Legal Practitioners Act. It is also reported that the petition was dismissed by four of the Judges of the Madras High Court before whom it came for hearing. The important points that arose in the case were, did the alleged conduct if proved come within the purview of sec. 13 of the Legal Practitioners Act and furnish grounds on which the High Court could call upon the pleaders to show cause why they should not be suspended or their certificates cancelled, etc.

Their Lordships the Chief Justice and Benson, J., held that it did, and their Lordships Miller and Sankaran Nair, JJ., held *peñ contra*.

The other important question that may also be incidentally considered in this connection is whether sec. 13, cl. (f) refers at all to misconduct of pleaders or muktears before admission to the profession.

The marginal notes to secs. 12, 13, 14 are respectively "suspension and dismissal of pleaders and

muktears convicted of criminal offence," "guilty of unprofessional conduct." "Procedure when charge of unprofessional conduct is brought in subordinate Courts." The marginal notes indicate and the sections show beyond any doubt that what is intended by the Legislature is *misconduct during the pleader's career* as a professional man. What the Legislature aims at is the safeguarding of the interests of the public against pleaders and muktears in whose hands the interest of clients may not be safe. Does the Act provide at all for misconduct other than professional apart from sec. 12 which provides against the retention in the profession of pleaders convicted of offences implying defects of character which unfit them to be pleaders? It was not certainly the intention of the Legislature to confer on the High Courts the duties of a moral censor.

Sec. 13 of the Act enumerates in cls. (a) and (b) acts of such a nature as may prove ruinous to those whose interests might have been entrusted to them or to their care, and in cls. (c), (d) and (e) acts whose consequences might lead to the disappointment of clients or betrayal of their confidence and to the jeopardy of their free use of discretion in the choice of pleaders or muktears. Cl. (f) adds *any other reasonable cause*.

The last clause is interpreted to mean that it includes misconduct of any nature other than professional. It is argued (1) that everyone of the clauses of sec. 13 provides for a distinct and a separate *genus* of causes and that therefore cl. (f) provides for and includes causes other than professional. In *In the matter of Purna Chunder Pal*, 4 C. W. N. 389 : s. c. 27 Cal. 1023, Hill, J., to whom the question was referred on a difference of opinion between Ghose and Rampini, J.J., gave his opinion as follows: "Each of the clauses of sec. 13 which precedes cl. (f) seems to me to be generically distinct from the rest and to be exhaustive of its own *genus* and where this is so, I think, the principle of *ejusdem generis* can hardly apply. In my judgment cl. (f) was intended to cover misconduct other than professional and to embrace all causes other than those previously enumerated in the section." With all deference to the opinion of his Lordship it does not seem clear how each clause provides for a distinct *genus* of causes. The several acts of misconduct seem to have one thing in common and that is that they are acts of misconduct of the same nature or in the same capacity, that is to say, in *the capacity of pleaders or muktears*. It is to regulate the conduct of pleaders in their capacity as such that the Act was framed and it could not be supposed that the Legislature intended to do more than that. Mr. Justice Hill ignores the principle of interpretation of statutes which was stated by Justice Ghose, that when general words follow particular words of the same nature, they are

presumed to be restricted to the same genus as those words, unless it can be seen from an inspection of the scope of the legislation that the general words were meant to convey a wider meaning (Maxwell on the Interpretation of Statutes, pp. 469, 475).

Another argument that is put forward is that as sec. 12 provides for cases where pleaders are convicted of such offences as imply a defect of character which go to unfit them as pleaders, sec. 13 provides for all conceivable moral defects. If true, it is a dangerous doctrine, as that will place no restriction on the scope of the words "moral defects" and they may mean any moral delinquency. It is difficult to conceive that the Legislature intended to invest any Court with such powers.

As to whether sec. 13 contemplates any misconduct before the admission of pleaders as pleaders, it has been very rightly said that it is the examining authorities, and not the Legal Practitioners Act, who are more concerned with misconduct anterior to admission as pleaders. Mr. Justice Ghose pointed out in *In the matter of Purna Chunder Pal*, 4 C. W. N. 389 : s. c. 27 Cal. 1023: "Any misconduct anterior to the admission may be a ground for cancelling his examination and the certificate granted to him, and thereby disqualifying him to practise as pleader (see sec. 10) but I doubt whether he could be for this reason dismissed or suspended under sec. 13 of the Act."

The Madras High Court in *In the matter of a pleader*, 26 Mad. 448, apparently followed the dictum in *In the matter of Purna Chunder*, 4 C. W. N. 381 : s. c. 27 Cal. 1029 (*vide* judgments of Hill and Rampini, J.J.). In that case a pleader wrote a letter, which he did not sign, to an officer who was conducting an inquiry into a charge of bribery against a Revenue Inspector in which letter he made allegations which were intended to prejudice the mind of the officer in connection with the matter which he was investigating. Their Lordships, the Chief Justice and Moore, J., held that the conduct was such as came within the words, "any other reasonable cause" (cl. (f) of sec. 13) and they followed the case in *In the matter of Purna Chunder Pal*, 4 C. W. N. 389 : s. c. 27 Cal. 1023, aforesaid. The order of the Judges does not state any reasons. But in *In the matter of a first grade pleader*, 24 Madras 17, where a pleader was charged with disrespectful language to the District Judge in the capacity of a party to a case, the Madras High Court while holding that the language used by the pleader in a counter petition was improper, held that "steps should not have been taken against the petitioner under the Legal Practitioners Act so long as it was possible to take notice of the act in any other way as one committed by the suitor." (Subramania Aiyer and Davies, J.J.). This case was cited in defence in the case of *Re a Pleader* published in 26 Mad. 448 cited above. But their Lordships while following the

contrary decision in 27 Cal. 1029 do not make any reference to the earlier Madras case at all. The more recent Madras decisions seem to run counter to the principal that disciplinary measures are intended to guard against professional misconduct.

We cannot do better than conclude by referring to the important decision in 26 Bom. 423 (Full Bench) (*Damodar Vencatesh v. Bhavani Sankar Mangesh*) where his Lordship Jenkins, C. J., delivering the judgment of the Full Bench quotes with approval the ruling of the Lord Justice Blackburn in *Re Cutts* (1867), 16 L. J. (N. S.) 115, who says "we do not sit to punish personal but professional misconduct." Relying on this sound maxim their Lordships in 26 Bom. 423 dismissed the application of Damodar Vencatesh against the Defendant pleader for exercise of the High Court's disciplinary jurisdiction in the matter.

The weight of authority is certainly in favour of the view that the disciplinary powers conferred under sec. 13, cl. (f) of the Legal Practitioners Act should be limited to professional misconduct.

#### CRIMINAL CASES OF 1908.

— (Continued from p. clxvi).

[*Obedience to High Court Rulings*]. A Sessions Judge should follow the rulings of the local High Court instead of expressing dissent from the general principles there laid down (*Durga v. Emperor*, 8 C. L. J. 59, 62). There is considerable misapprehension on the point in the mofussil, and accordingly the law is here laid down in full. (i) Every subordinate Court is bound to follow without question a decision of its own High Court when applicable to the case before it (28 All. 62: 30 Bom. 226: 24 Cal. 157: 19 Mad. 260, 261: 2 C. W. N. 190, 197: 6 Mad. 203, 226, 227: 19 Bom. 51, 60: 34 Cal. 672, 675: 15 Cal. 385), unless its authority is questioned by a Full Bench or the Privy Council (30 Bom. 226: 15 Cal. 388: 28 All. 62, 72: see 5 W. R. Cr. Letters 3). The lower Court can distinguish a High Court ruling (24 Cal. 157), but cannot refuse to follow it on the ground of its being that of a Divisional Bench and not fully argued (15 Cal. 388). In *Mahomed v. Swee*, 25 Cal. 486, (and see also 30 Bom. 226) the High Court returned a reference to it by the Recorder of Rangoon who was disinclined to follow the Calcutta rulings. (ii) If there is a conflict of rulings between the High Courts he must follow the ruling of the High Court, to which he is subordinate (25 Cal. 488: 15 Cal. 388: 7 All. 174: 30 Bom. 226). (iii) A Full Bench ruling is binding on all Division Benches on the point of law determined, unless subsequently reversed by a stronger Full Bench or the Privy Council (Rules of Calcutta High Court Appell., Pt. II, Ch. V, R. 6, and 34 Cal. 735, 740: 34 Cal. 941: see 10 Cal.

937, 943: 10 Bom. 132, 138: 12 W. R. Cr. 11, 14: 8 Sevestre's Rep. 485), even if the majority of the Full Bench is numerically fewer than the Judges who have decided the other way (8 Cal. 985, 992, 993: cf. 9 Cal. 288). (iv) The ruling of a Division Bench of two Judges is not affected by a subsequent conflicting decision of a single Judge (5 W. R. Cr. Letters 3), and is to prevail in preference to that of a single Judge on the Original Side (10 Cal. 140, 142 and see 16 Cal. 206, 220). A decision is valuable or not in proportion to the consideration given to the questions involved and the reasons given in it (19 All. 390, 498), but an opinion incidentally expressed by way of argument is not binding though entitled to weight (28 Cal. 652, 662.)

**CUMULATIVE SENTENCES.**—An accused can be charged with, tried for and convicted of, separate offences committed in the same transaction under sec. 235, but separate sentences, where one offence is the aim and object of the other, are contrary to sec. 35, e.g., secs. 457 and 354 (*Re Sheik Jigir*, 12 C. W. N. clxxxvii). This matter has already been fully dealt with by the Author in the "*Criminal Cases of 1906*."

Where the hurt which converts the unlawful assembly into rioting is the subject of a separate charge there cannot be a separate conviction for it if committed in the prosecution of the common object (*Loke Nath v. Queen-Emress*, 11 Cal. 349), but if the hurt is in addition to, and not in pursuance of, the common object, the accused can be punished both for rioting and hurt (*Deonarain v. Emperor*, 12 C. W. N. cxlvii: and see 16 Cal. 725, 19 Cal. 105). An interesting question arises whether, if a person causes hurt to different persons in the same transaction, he is punishable for each act of hurt or whether the several hurts are to be considered as one act of hurt. The cases in 8 C. W. N. 483 and 9 All. 645, per C. J., have some bearing on the point. Of course a man cannot be separately sentenced for rioting and hurt caused by another member of the assembly under sec. 149, I. P. C. (*Nilmony Poddar v. Queen-Emress*, 16 Cal. 442, followed in 3 C. W. N. 761, 4 C. W. N. 245, 8 C. W. N. 344). In such a case a sentence under sec. 147, I. P. C., cannot be set aside and one under secs. 147 & 149 upheld, but the latter must be quashed (*Molai v. Mohamet*, 12 C. W. N. cxiv). The principle of 16 Cal. 442 was held not applicable to convictions of rioting and offences other than those involving hurt committed by other members, e.g., unlawful assembly with the common object of committing trespass and theft and theft by another member (*Hansa v. Bansai*, 8 C. W. N. 519). But this does not appear to be correct. The meaning of the Full Bench division seems to be that the offence of, e.g., secs. 147 & 149 is resolvable into the constituent

elements of rioting and grievous hurt, each of which is a part of, and included in, it. On this principle an offence under secs. 143, 144, or 147 + 379, and the theft would be a part of the offence constituted under secs. 143, and not separately punishable when not individually committed by a person.

**ARREST.**—A police-officer is *prima facie* justified in entering into a building to arrest suspected persons (*Brajendra v. Luffman*, 12 C. W. N. 982, affirmed in 13 C. W. N. 485), and if, while lawfully conducting a search, he assaults some one on the premises his entry thereon does not become illegal *ab initio* (*Ibid*, 12 C. W. N. 982).

**WARRANT.**—[Initials]. A signature by initials in a criminal warrant is an irregularity which does not affect the validity of the proceedings (sec. 537 and *Subramania Ayyar v. King-Emperor*, 25 Mad. 61, 97), when proved or identified to be those of the proper person (*Abdul v. Mathu*, 5 C. W. N. 447; see 23 Cal. 896), though it is not desirable to allow them. Initials in a civil warrant have been held to constitute "signature" under the Code and the General Clauses Act (*Jogendra v. Emperor*, 12 C. W. N. xlv). But this by no means clear (*Queen-Empress v. Fanki*, 8 All. 293).

**PRODUCTION OF DOCUMENTS.**—[By accused]. The accused cannot be compelled to produce incriminating documents against himself at his trial (*Ishwar v. Emperor*, 12 C. W. N. 1016).

[Search warrants]. Sec. 96 refers back to sec. 94 and does not authorize the issue of a search warrant when there is no proceeding pending before the Court issuing the same. (*Rash Behary v. Emperor*, 55 Cal. 1076; *Clarke v. Brajendra*, 13 C. W. N. 458; *Re Harilal*, 22 Bom. 949, 950), though the Magistrate then has information of the commission of an offence but has not acted judicially on it (35 Cal. 1076). The re-issue of a search warrant after subsequently taking cognizance is, however, legal (*Ibid*). A Magistrate issuing a search warrant, when no proceeding is under the Code pending before him, is not a Court. (*Brajendra v. Clarke*, 12 C. W. N. 973, affirmed in 13 C. W. N. 458). The issue of a search warrant is a judicial act, and is to be ordered after inquiry and on proper materials (*Mahomed v. Amed*, 15 Cal. 109; *Clarke v. Brajendra*, supra, p. 467. See *Re Lakshmidas*, 5 Bom. Law Rep. 980, 982 and cf. *Hope v. Evered*, 17 Q. B. D. 338, 340). A search by a Magistrate is not a judicial act (*Clarke v. v. Brajendra*, supra). A warrant illegally issued under sec. 96 cannot be treated as valid under sec. 98 by reason of sec. 537. (*Rash Behary v. Emperor*, 35 Cal. 1076).

**SEARCH BY MAGISTRATE.**—A Magistrate can only conduct a search under sec. 105 when it is competent to issue a search warrant, i.e., during the pendency of a proceeding under the Code. A general search for arms, and not a search for a particular

weapon for the purposes of a pending proceeding, is not contemplated by the section (*Clarke v. Brajendra*, 13 C. W. N. 458). The Court can in such a case either issue a search warrant under sec. 96 or conduct a search under sec. 105. Sec. 165 applies to police-officers and not to Magistrates (*Ibid*). The only sections which allow search warrants without any proceeding are secs. 98 and 100 (*Ibid*). When there is a special Act and a general Act dealing with searches for arms the search must, in the absence of evidence to the contrary, be taken to have been conducted under the former, especially if the Magistrate has power under the latter section under the circumstances (*Ibid*). If a police-officer is duly conducting a search the District Magistrate is justified in directing him to make it (*Ibid*). Sec. 6 of Bom. Act IV of 1887 is subject to the general provisions of secs. 64 and 105 of the Code (*Emperor v. Fenad*, 31 Bom. 438).

E. H. MONNIER.

(To be continued.)

#### CURRENT INDIAN CASES.

**EMPEROR v. HUSSAIN**, I. L. R. 31 Mad. 548. Cr. P. C., sec. 565—Penal Code, secs. 176, 177.

"... cases under sec. 565 (4) of the Code of Criminal Procedure should be dealt with under the first part of sec. 176 of the Indian Penal Code. We are fortified in this opinion by the ruling in *Penatulla v. Queen-Empress* (15 Cal. 386), in which it was held that the aggravated penalty constituted by the second clause of sec. 177 of the Indian Penal Code can only be inflicted when the information required to be given relates to the commission of some particular offence, and not of offences generally."

**EMPEROR v. DHONDU**, I. L. R. 33 Bom. 22. *Workmen's Breach of Contract Act* (XIII of 1859).

"A penal enactment must be construed strictly and it appears to us that under Act XIII of 1859, secs. 1 and 2, the proceedings of the Magistrate up to and inclusive of the passing by him of an order for either re-payment of the advance or performance of the contract do not constitute a trial for any 'offence' as defined in the Criminal Procedure Code." (*Chandavarkar and Aston, JJ.*).

An offence under the Workmen's Breach of Contract Act cannot be tried summarily.

**EMPEROR v. BALU SAGJI**, I. L. R. 33 Bom. 25. *Workmen's Breach of Contract Act* (XIII of 1859).

An offence under the Workmen's Breach of Contract cannot be tried summarily.

**THE TRUSTEES FOR THE IMPROVEMENT OF THE CITY OF BOMBAY v. KADSANDAS NATHU**, I. L. R. 33 Bom. 28. *Compulsory acquisition of land*.

"The value of the land to the owner is what

must be regarded, and that is the price which it will fetch if disposed of on the most profitable terms. . . . And the owner, it seems to us, is not to be deprived of the most advantageous way of selling his land by reason of the fact that it is subject to immediate acquisition."

**EMPEROR v. BHANSING**, I. L. R. 33 Bom. 33. *Cr. P. C., sec. 106.*

According to sec. 106, cl. 3, an order for security may be made in appeal whether the original Court had jurisdiction to pass such an order or not.

**NATHU v. UMEDMAL**, I. L. R. 33 Bom. 35. *Pleading.*

In appeal a new point cannot be allowed to be raised against the successful party in the original suit.

**SHIVRAM v. SAKHARAM**, I. L. R. 33 Bom. 39. *Mitakshara family—Debt of father—Execution.*

A money decree obtained against the father can be executed after his death against his sons to the extent of the ancestral property that has come into their hands even if the debt had been incurred for the sole purposes of the father provided that it was not tainted with immorality and illegality. They may raise objection under sec. 244, C. P. C., as to whether the debt was tainted with immorality.

**RANU v. LAXMANRAO**, I. L. R. 33 Bom. 44. *Transfer of Property Act, sec. 59—Attesting witness.*

A Sub-Registrar who signed his name at the time of registration is not a competent witness to a mortgage deed.

**DATTATRAYA v. RUKHMABAI**, I. L. R. 33 Bom. 50. *Maintenance—Cause of action.*

Where a Hindu widow had funds belonging to her deceased husband's estate sufficient for five years' maintenance, held that no cause of action accrued for a suit for maintenance during the existence the funds.

### Reviews.

A TREATISE ON THE LAW OF CONTRACTS. By Joseph Chitty, Jun., Esq. Fifteenth Edition. By Wyatt Faine, of the Inner Temple and North Eastern Circuit, Barrister-at-Law. London, Sweet and Maxwell, Ltd., 3 Chancery Lane.

The first edition of the present work takes us back to the year 1826, when the author of the original treatise was able to state, with considerable truth that "the rapid extension of commerce and the variety and increase of the transactions of man-

kind have furnished and constantly supply fresh and abundant materials for a renewed and fresh investigation of this subject." The same causes have furnished grounds for every successive edition of the treatise, and not the least of the present. The editor fully justifies his claim that the present edition is no mere reproduction of the previous one, modernised by inclusion of recent cases, but rather a compendious and thoroughly up-to-date disquisition upon the whole law of contractual obligations as regulated by statute and interpreted by judicial decisions. At the same time he adheres to the original scheme of the treatise, which was to treat exclusively of such matters connected with simple contract as are of common occurrence in business. Special subjects such as Bailment, Bills of Exchange, &c., Contracts of Employment, Contracts for Loan of Money and Insurance, etc., are dealt with briefly and in a more or less general way, the reader being referred to other treatises on such subjects for more detailed information. The book is intended for use by practising lawyers in the first instance and accordingly one finds in it a wealth of details and an abundance of references not usually found in a student's hand-book. At the same time the present editor has not overlooked the discussion of theories, as no text-book on law at the present day can really afford to do. "Chitty on Contracts" does fill and will, if subjected to the same careful revision as we find evidenced in the present edition, continue to fill a place not easily to be taken up by another treatise on the same subject, and we are sure the present edition will receive the welcome which it deserves from practising lawyers in England and outside England where the same laws of contract obtain.

THE STUDENTS' SUMMARY OF THE LAW OF CONTRACT. By J. G. Pease, Assistant Reader in Common Law to the Council of Legal Education and A. M. Latter, Reader of the Law Society, London. Butterworth & Co., 11 and 12 Bell Yard, Temple Bar. Law Publishers. 1909.

This is an excellent students' hand-book prepared by gentlemen who are actually engaged in teaching law. The main principles established by judicial decisions in each branch of the law of contract are embodied in more or less comprehensive propositions and these are followed by notes which in some cases explain and in others qualify those propositions. What is even more commendable is that the propositions are illustrated by concrete examples most of which are drawn from reported cases which are referred to in the foot-notes. The book is therefore a good deal more than a mere aid to memory, and the authors' expectation that it may be found useful to supplement the study from well-known students'

books of those elementary principles of the Law of Contract which are necessary for an intelligent appreciation of the reports, seen from all points of view to be a very reasonable one.

### Notes of Cases. ENGLISH LAW COURTS.

#### PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.]

LORD ATKINSON.

LORD COLLINS.

LORD GORELL.

SIR ARTHUR WILSON.

1909,

1, April.

BRAYE, Appellant,  
v.  
HORSFELL, Respondent.

*Grant—Construction—Special leave granted, subject to Respondent being allowed to raise point decided against him, without filing cross-objective.*

This was a petition for special leave to appeal from a decision of the High Court of Australia which reversed a judgment of Mr. Justice Simpson, Chief Judge in Equity of the Supreme Court of New South Wales.

The case raised an important question of property law. The Appellant had purchased in 1906 from the Respondent a piece of land on which stood a house known as "Bull's Buildings" with windows and doorways facing on to a private lane which also belonged to the Respondent. Bull's Building had been conveyed by deed in January 1907 by the Respondent to the Appellants and the conveyance expressly conveyed the land "together with all rights, easements and appurtenances thereto belonging or commonly used therewith."

Simpson, J., found as a fact that the rights of light and way over the land in question had been commonly used with Bull's Buildings for many years past, the lane being a formed and defined road.

About three months after the conveyance to the Appellant they had pulled down Bull's Buildings, and executed a new house upon the site with doors and windows facing on the lane. The Respondent had blocked up these doors and windows and the action was brought to restrain the obstruction and the learned Judge granted an injunction accordingly.

An appeal from this judgment to the High Court of Australia was heard by Griffiths, C. J. and Barton and Isaacs, JJ. In the result Isaacs, J., differing from his learned brethren, the Court agreed with the judgment of Simpson, J., and described the case as raising legal questions of the greatest importance. Barton, J., simply concurred with the judgment of Griffiths, C. J. Griffiths, C. J., thought that the judgment of the Court below ought to be reversed on the ground that the words "together with the rights, &c., commonly used there-

with" had no precise legal signification, and that evidence was admissible to shew the circumstances under which the grant had been made, and that there was evidence that both parties had known that the Appellant intended to pull down Bull's Buildings and build a new house in their place and that the Respondent intended to build upon the lane. In these circumstances he considered that the proper inference was that the Petitioner did not intend that he should have any right over the lane in future and therefore the rights could not be said to be commonly used with the Appellant's premises. He also thought that if on the true construction of the conveyance the Appellant was entitled to the rights which he claimed the conveyance did not truly represent the intention of the parties and ought to be rectified. A claim for such rectification had been made before the Judge of first instance who had found that there had been no mutual mistake and had refused to grant rectification. The learned Chief Judge in the High Court took a different view upon this point, and would have granted rectification if it had been necessary but as he was in favour of the Respondent on the question of construction it became unnecessary to grant rectification.

From this judgment of the High Court the Appellants now sought leave to appeal and after argument Lord Atkinson delivering the judgment of the Judicial Committee said that leave to appeal would be granted upon the usual terms as to security for costs but that the Respondent would be at liberty to raise the question of rectification again before the Board without the necessity of filing a cross petition of appeal.

Mr. Levett, K. C., and Mr. A. Adams for the Appellant.

Mr. P. F. Wheeler for the Respondent.

J. H. W. A.

*Leave granted.*

### CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before CHITTY and VINCENT, JJ. APPEAL FROM ORDER NO. 383 OF 1908. PURNA CHUNDER MONDAL, Appellant v. ANUKUL BISWAS AND OTHERS, Respondents. Heard, 6th and 7th April. Judgment, 14th April 1909.

*Limitation Act (XV of 1877), sec. 18—By means of fraud kept from knowledge—Onus of proof.*

The second appeal arose out of an application made by a judgment-debtor to set aside a sale in execution. The sale took place on 17th January 1896. The judgment-debtor applied to the Court

to have the sale set aside on the 15th April 1907 on the ground of fraud. The first Court held that the Petitioner had utterly failed to prove that there was any fraud or collusion on the part of the decree-holders or the auction-purchaser in bringing the property to sale and accordingly dismissed the application. On appeal it was held that there was fraud on the part of the decree-holders and that they had got the property sold to the Appellant in collusion with certain judgment-debtors and the sale was set aside.

*Held*—That it was incumbent on the Petitioner to satisfy the Court that he had been by means of fraud kept from the knowledge of the sale having taken place to his prejudice and further he had to show with regard to the auction-purchaser, the Appellant, that he was either himself guilty of the fraud or an accessory thereto.

When a suit or an application is, on the face of it, barred, it is for the Plaintiff or the applicant to satisfy the Court of circumstances which would prevent the statute from having its ordinary effect.

*Babus Sarat Chunder Roy Chowdhury and Charu Chunder Bhattacharjee* for the Appellant.

*Babu Sarat Chunder Ghosh* for the Respondents.

A. T. M.

*Appeal allowed :  
Abdication refused.*

CIVIL APPELLATE JURISDICTION. Before CHITTY and VINCENT, JJ. APPEAL NO. 1714 OF 1907. SETAL CHANDRA BHATTACHARJEE *v.* AFILUDDI. 28th April 1909.

*Suit by a co-sharer landlord for his share of the rent—Whether governed by sec. 153 of the Bengal Tenancy Act—Whether the other co-sharers being made pro forma Defendants makes any difference.*

The Plaintiff, a co-sharer landlord, sued the Defendant for a share of his rent making his other co-sharers *pro forma* Defendants to the suit. The principal Defendants pleaded that the Plaintiff was not entitled to the holding which fell to the share of the other co-sharers. The Munsif found that the Plaintiff was entitled to the holding in part and gave him a decree for his share of rent. On appeal the District Judge found that the Plaintiff could not prove separate collection and dismissed the suit. The Plaintiff appealed to the High Court.

On behalf of the Respondent a preliminary objection was raised that the appeal was barred under sec. 153, Bengal Tenancy Act. The Appellant contended that the appeal was not barred and relied upon the case in 8 C. W. N. 472 urging that co-sharers were made *pro forma* Defendants in the case. In reply it was urged on behalf of the Respondents that after the Privy Council decision in *Raja Pramotha Nath's* case, 12 C. W. N. 249, the case in 8 C. W. N. is no longer good law. Reference was made to

the case in 12 C. W. N. 835, and it was urged that the making of co-sharers *pro forma* Defendants made no difference—the only question was to see whether the suit by a co-sharer landlord for his share of rent was a suit under the Bengal Tenancy Act.

*Held*—The suit is governed by the Bengal Tenancy Act and under sec. 153 of the Act no appeal lies. That the ruling in the case 8 C. W. N. 472 can no longer be regarded as good law after the decision of the Privy Council case.

*Babu Jnanendra Nath Sarkar* for the Appellant.

*Babu Brajendra Nath Chatterjee* for the Respondent.

*Appeal dismissed without costs.*

CIVIL APPELLATE JURISDICTION. Before BRETT and COXE, JJ. APPEAL FROM APPELLATE DECREE NO. 2444 OF 1906. NARMADA SUNDARI DEBI, Plaintiff, Appellant *v.* TARIP MOLLAH AND OTHERS, Defendants, Respondents. Heard, 9th March. Judgment, 18th March 1909.

*Burden of proof—Encumbrances, suit to annul—Bengal Tenancy Act (VIII of 1885), sec. 167.*

The Plaintiff sued to recover khas possession of certain lands as included in her *ganti* tenure which she purchased in execution of a decree for arrears of rent and for ejectment from the same of the Defendants on the ground that their holding of the tenure was an encumbrance which she was entitled to annul. A notice under sec. 167 of the Bengal Tenancy Act was served on the Defendants. The Defendants claimed a permanent tenancy under jamai right in the land, and also pleaded that a certain portion of their holding was a protected interest as containing houses, gardens and tanks.

*Held*—It rested on the Plaintiff to prove that the tenancy which she sought to annul was one which had been created after the *ganti* tenure was brought into existence.

*The Advocate-General (Mr. S. P. Sinha) and Babus Dwarka Nath Chuckerbutty and Surendra Nath Roy* for the Appellant.

*Moulvi Syed Shamsul Huda, Babu Girija Prasanna Roy Chowdhury and Moulvi Nuruddin Ahmed* for the Respondents.

A. T. M.

*Appeal dismissed.*



# THE Calcutta Weekly Notes.

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[No. 26]

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### REPORTS (See Index.)

THE GENERAL COUNCIL OF THE BAR OF ENGLAND is opposed to the decentralization of the administration of justice, yet the facts disclosed in its report go to show that such decentralization is badly needed in England. Under the English system the Original Jurisdiction in all suits and actions, whether civil or criminal, from all parts of England and Wales are concentrated in His Majesty's Judges of the High Court of Judicature. The circuit system is supposed to bring justice to the doors of all His Majesty's subjects. The system had no doubt in the old days afforded great relief and protection to the English people. But this mode of administration of justice has long been found obsolete and dilatory. Its object originally was to prevent long detention of the accused persons in prison without a trial, but in practice it has not been found to have sufficiently fulfilled its objects, at any rate, according to modern ideas. Of course, in the days happily gone by, at least, in the British Isles, public conscience would have thought nothing of detention of persons in prison for months without any trial or charge.

BUT IDEAS HAVE GREATLY CHANGED IN MODERN times and we find the English press criticising the long detention of under-trial prisoners, consequent to the Circuit System, as a public scandal. Lord Halsbury's Bail Act was passed with the object of mitigating this evil. But we have noticed from time to time that this measure has not sufficiently met the evil. A "New Circuit System" was organised in March last and we expressed our doubt at the time whether a system which was radically defective and quite out of date could be mended

in this manner. There was a proposal in the air at one time of reintroducing Circuit System in this country. (See 32 C. W. N. cxxx). We said then that it would be a very hazardous experiment to try at the expense of the people of this country. We are now told by the General Council of the Bar that "the scheme under consideration (i.e., the New Circuit System), so far from mitigating, tends rather to aggravate the acknowledged evils of Circuit System." As instances it is said that "on the South Eastern Circuit no less a time than five months elapses between the commission days of the summer and autumn Circuits." The consequence is "the possible detention in prison of persons awaiting trial in all the counties upon the Circuit for five months." On the South Western Circuit "persons awaiting trial may possibly be detained in custody for upwards of six months." These facts alone are sufficient to condemn the system. Instead of our going back to this obsolete system, the system of our District and Sessions Courts may furnish the English law reformer with much useful suggestion for extending the system of local administration of justice.

THERE ARE NO JUDICIAL OFFICERS OF THE POSITION of Sessions Judges in any county in England. The jurisdiction of County Courts is limited to money claims not exceeding £50. Although Judges of such Courts are ordinarily eminent lawyers whom we would any day be proud to have on the Benches of the High Courts in India yet as Civil Judges their powers are more limited than those of an ordinary Munsif in this country. Any law reformer who made himself bold to suggest that the English County Court Judges should be invested with the same jurisdiction as our higher grade Munsifs or Subordinate Judges, would perhaps be taken for a revolutionary. The General Council of the Bar strongly opposed the raising of the County Court Jurisdiction from £50 to £100. We do not wonder therefore that the Council "did not consider it desirable that the County Courts should become constituent branches or parts of the High Court." All the Mofussil Civil Courts in India are constituent parts or branches of the High Court and the subordinate Courts in India are admitted on all hands to be a most popular and efficient branch of the Indian administration.

THE BAR OF ENGLAND IS A POWERFUL BODY AND means practically the Bar of the High Court of Judicature in London. The Central Bar of England naturally apprehends that any decentralization of the machinery of the administration of justice will lead to its disintegration. Their opposition therefore to the extension of the jurisdiction of the County Courts is in self-interest. In fact the Council makes no secret of it and solemnly says "that anything which tends to lower the position and to affect the efficiency of the Bar is a matter of public concern." True enough, and so far we are in perfect agreement with the Council. But when the Council proceeds to assert that "there can be no doubt that in providing for extended local administration of justice through the medium of the County Courts, one of the first results will be to break up the profession into fragments and to reduce its efficiency in the service of the public," we fail to see why its efficiency or its services to the public should suffer in any way by such decentralization. Local administration of justice in India has served to build up a strong and efficient local Bar in every Mofussil town and subdivision. We are much ahead of England so far as our machinery for the administration of justice is concerned; only we want a more efficient judiciary to work it efficiently and to turn out a better quality of justice.

THE LATE DR. WHITLEY STOKES, LAW MEMBER of the Council of the Governor-General from 1877-1882, was a man of many-sided activities. He came out to India in 1862. He was successively a reporter to the Madras High Court, acting Administrator-General of Madras, Secretary to the Governor-General's Legislative Council, Secretary to the Government of India in its Legislative Department, and Law Member. He was a man of solid learning and great industry. Ample testimony of this is borne by the number of consolidating enactments that were passed during his tenure of office, the Civil and the Criminal Procedure Codes, the Transfer of Property Act and the Companies Act, amongst others. His experience in the various legal offices which he occupied in India fitted him in a peculiar manner for the authorship of his well-known Anglo Indian Codes with notes, which were not the only legal publications which he edited. After his retirement from India he devoted himself to philological studies, chiefly Irish and Cornish, resulting in the production of several treatises dealing with these subjects. Dr. Stokes was born in 1830 and died at the ripe age of 79.

#### THE LATE BABU UPENDRA NATH MITTER.

We regret to record the death from heart failure of Babu Upendra Nath Mitter, M. A., B. L., Vakil,

High Court, who passed away on the 3rd of May last. Babu Upendra Nath Mitter's career was one of uniform success. Born in Calcutta on the 13th January 1842, he passed the Entrance examination in 1857 in the First Division and secured a junior scholarship, and later on in 1858-59 a senior scholarship, which again was followed up by a scholarship of Rs. 50 at the B. A. Examination which he passed in the First Division in 1861. In the following year he stood first in the B. L. Examination and the gold medal of the Calcutta University for high proficiency in law was for the first time awarded in 1862 to him. He took his M. A. degree in 1863, having previously been enrolled as a pleader of the Sudder Dewani Adawlut on the 22nd February 1862, and as a pleader of the newly constituted Calcutta High Court on the 6th July of the same year. Pre-eminently a scholar, he started life by accepting the appointment of a law lecturer of the Dacca College in 1863. But his natural abilities and knowledge of law also brought him to the front rank of pleaders then practising at the Dacca bar. In 1871 he was offered and accepted the appointment of Government pleader of Dacca. In 1877 when the Limitation Bill, which subsequently became Act XV of 1877, was under consideration, Babu Upendra Nath submitted a note to the Select Committee, consisting of Sir Arthur (afterwards Lord) Hobhouse, Mr. E. C. Bayley, Mr. F. R. Cockerell and Maharaja Jatindra Mohan Tagore, and they were so impressed with "the force and value of his suggestions" that not only were these embodied in the Bill but he was invited to offer his opinion as to "whether these now provisions were in his judgment suitable and sufficient." Babu Upendra Nath retired from the Dacca Bar in 1879 and returned to Calcutta to practise as a Vakil in the High Court. He became Tagore Law Lecturer in 1882. Readers of this note will not be surprised to learn that his Tagore Lectures received high praise from, amongst others, the late Dr. Whitley Stokes, who had then retired after filling the office of the Law Member of the Viceroy's Council with distinction. The book became at once the standard work on the subject in India. In perfecting this work and in bringing out successive editions of it, Babu Upendra Nath Mitter may be said to have found his true vocation in life and he was engaged in it almost to the time when death overtook him. Four editions of his work have already appeared and the legal profession will be interested to know that he lived long enough to complete the manuscript of his fifth edition and, in fact, to put a considerable portion of it through the press. It should be mentioned that in 1892 Babu Upendra Nath had been appointed a Fellow of the Calcutta University.

The eminent lawyer and author was of a retired disposition, kindly and courteous to all and of

a distinctly scholarly bent of mind. Even after his return to Calcutta he took up in 1884 the appointment of a Law lecturer in the City College, and his time, until he retired from that and every other form of active life, was practically divided between his duties as a teacher of law and his work as an author. Though successful as a pleader, his career as such at Dacca was rather an episode in a life otherwise almost exclusively devoted to study. His work on Limitation and Prescription takes rank amongst the leading standard works on the subject, Indian or European. His death removes from amongst us one whose name is familiar to every lawyer in India and to many outside it.

### CRIMINAL CASES. OF 1908.

(Continued from p. clxxii).

SECURITY ON CONVICTION.—[*House-trespass*]. It has been repeatedly observed by the Author in previous Articles\* that sec. 106 relates only to offences involving a breach of the peace, *i.e.*, offences in which the act of a breach of the peace is an element, and not to offences attended with criminal force. A comparison between secs. 106 and 522 makes the distinction clear. There must in the next place be an *accusation* and a *conviction* of such offence. A *finding* of acts disturbing the peace, or being likely to do so, does not warrant an order under the section. The Madras High Court in the recent case of *Re Pattamabi*, 19 Mad. L. J. 66, has taken the right view in holding that "house-trespass" under sec. 448, I. P. C., does not involve a breach of the peace, and that a conviction thereof does not justify an order. The Calcutta cases have, however, held that where the conduct and acts of the accused, while committing criminal trespass, indicate an intention to commit a breach of the peace, an order under sec. 106 is legal (*Tarini v. Gourikant*, 7 C. W. N. 25; *Queen v. Gendoo*, 7 W. R. Cr. 14; *Queen v. Jhapoo*, 20 W. R. Cr. 37), but not where the intent was to have illicit intercourse, though the accused subsequently assaulted the complainant (*Subal v. Ram*, 25 Cal. 628), though a *clear finding* of these facts is in such cases necessary (*Baidya v. Nibaran*, 30 Cal. 93, 94). [*Unlawful assembly*]. An order under sec. 106 on a conviction under sec. 143, I. P. C., is illegal (*Raj v. Bhagabat*, 35 Cal. 315). See also *Muthiah v. Emperor*, 29 Mad. 190, and cf. *Kannookgran v. Emperor*, 26 Mad. 469. But other rulings have held that a conviction under sec. 143, I. P. C., is not of itself sufficient unless clearly found that force was employed, or that there were armed men present (*Chandra v. Emperor*, 7 C. L. J. 172; see also 8 C. W. N. 517; 27 Cal. 983; 30 Cal. 93; 26 Cal. 576; 11 C. W. 176; 11 C. W. N. ccv; 5 C. W. N. 250).

\* 11 C. W. N. ccxxii and 12 C. W. N. clxxiii.

[*Order by Appellate Court*]. An Appellate Court cannot exercise the power under sec. 106 (3) where the conviction was by a second or third class Magistrate (*Emperor v. Momin*, 35 Cal. 434; see also *Muthiah v. Emperor*, supra; *Paramasiva v. Emperor*, 30 Mad. 48, and *Mahmudi v. Aji*, 21 Cal. 622). This view was followed but doubted in *Dorasami v. Emperor*, 30 Mad. 182, and it has been dissented from in *Emperor v. Bhausing*, 33 Bom. 33.

E. H. MONNIER.

(To be continued).

### Reviews.

THE INTERLINED CODE OF CIVIL PROCEDURE (Act V of 1908), showing the reading of the corresponding sections of Act XIV of 1882, with an index and table shewing the disposition of the sections of Act XIV of 1882. By Maurice Remfry, Attorney-at-Law, Deputy Registrar, Original Side, High Court, Calcutta, [Copy-right]. Calcutta: Printed at the Methodist Publishing House, 46, Dharamtala Street. 1909. Bound in cloth Rs. 4-4; unbound Rs. 3-10. Index only, unbound, Re. 1-8.

No idea of this publication can be formed without looking into its pages. It is a most ingenious contrivance to enable the reader to gather at a glance the exact terms of a section of the new Civil Procedure Code and the corresponding section of the old Code and also the points of resemblance and difference between them. The result is achieved by printing different portions of the sections of the old and new Codes together but in different types and in different positions. The words which occur in the corresponding sections of both the Codes are printed only once. The omitted sections are reproduced at the end of the work. The subject index is very full and as it does not refer to the pages of the book, it is available for separate use. Considering the difficulty one meets with in handling the new Code and the importance of readily finding out the alterations introduced by it, both as to language and substance, the book will, during the present transitional period, prove exceedingly useful.

THE LAW OF CHILDREN AND YOUNG PERSONS (in relation to penal offences) including the Children Act, 1908. By L. A. Atherley Jones, K.C., M.P., and Hugh H. L. Bellot, D.C.L., Barristers-at-Law, with an Introduction by the Right Hon. Herbert Gladstone, M.P., Secretary of State for the Home Department. London: Butterworth & Co., 11 & 12, Bell Yard, Temple Bar. Shaw & Sons, 7 & 8, Fetter Lane, E. C. 1909.

The title of the book indicates its limited scope. The English Parliament has recently passed the

Children Act (of 1908) which has often been spoken of as the Children's Charter. It makes provisions for the effectual protection of children from not merely vicious outside influences but vicious parents and relations as well. Besides consolidating certain previous enactments to the same end it introduces various new provisions. It has brought into existence a large number of offences of which we may mention only two as samples, the overlaying of infants and the selling of tobacco to children; and it provides, amongst other matters, for the trial of juvenile offenders in special courts. Education authorities have been given, amongst other powers, that of cleaning verminous children. It is impossible, in the course of the present notice, to give any idea of the provisions of the 134 sections contained in this Act. The present work embodies these provisions as also certain other enactments, *e.g.*, the Prevention of Cruelty to Children Act of 1904, the Employment of Children Act of 1903, and the material sections of the Offences against the Person Act of 1861, and the Criminal Law Amendment Act of 1885. The provisions of the statutes are supplemented by notes by the authors collected from reported decisions and other sources, which materially help in elucidating the subject. The Children Act came into operation in April 1909. The appearance of the book just as the Act came into force is thus very opportune.

## Notes of Cases.

### \* CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

**CRIMINAL REVISIONAL JURISDICTION.** Before CASPERSZ and RYVES, JJ. CRIMINAL REVISION No. 153 of 1909. JOGDIP SINGH, 1st Party, Petitioner *v.* BIKAN SINGH, 2nd Party, Opposite Party. 17th April 1909.

*Costs in a proceeding under Sec. 145, Cr. P. C.—Assessment without notice to both parties—Illegality.*

In a proceeding under sec. 145, Cr. P. C., the Magistrate decided the question of possession in favour of the second party. It appears that at the time of decision the Magistrate did not pass any order as to the payment of costs. But subsequently on the same day the Magistrate passed an order directing the Petitioner (the first party) to pay the costs. When this order was made the Petitioner had left the Court. On a subsequent date the Opposite Party applied to the Magistrate for an order assessing the costs and the Magistrate in the absence of the Petitioner passed the following order:—"Allowed. Strike out the charge for Mr. Baxter's fee and realise the balance."

The Petitioner applied to the Magistrate objecting to his order for costs and their assessments and the Magistrate gave effect to the Petitioner's objection in part inasmuch as he disallowed the costs that arose in connection with a sec. 144, Cr. P. C., proceeding connected with the case under sec. 145, Cr. P. C.

The Petitioner then moved the High Court and obtained this Rule.

Their Lordships observed:—"We are informed, and it appears from the papers before us, that costs were assessed in these proceedings in the absence of the first party, the Petitioner. A Rule was issued on the ground, and we think that both on principle and on authority the assessment should have been made in the presence of both parties. The Rule is accordingly made absolute and the Magistrate is directed to assess the costs after giving proper notice to both parties."

*Babu Atulya Charan Bose* for the Petitioner.

B. C.

Rule made absolute.

**CIVIL APPELLATE JURISDICTION.** Before CARNDUFF, J. APPEAL FROM APPELLATE DECREE NO. 2156 OF 1907. KISHEN OJHA AND OTHERS, Appellants *v.* BUJRANGI UPADHYA AND OTHERS, Respondents. Heard, 15th April. Judgment, 21st April 1909.

*Ejectment—Tenant holding over—Notice, if necessary.*

The appeal arose out of a suit in ejectment brought by the Appellants against the Respondents on the basis of a *kabuliyat* executed on the 19th June 1880, and containing a covenant for re-entry on forfeiture through failure to pay rent. Both the Courts below dismissed the suit, on the ground that the term of the lease covered by the *kabuliyat* in question had expired, that the Respondents had been allowed to hold over after its expiration, that the covenant referred to could not, therefore, be taken advantage of, and that the Respondents were consequently not liable to be ejected without the notice which they were entitled to under secs. 106 and 116 of the Transfer of Property Act.

*Held*—That in the absence of a stipulation for re-entry, some notice is necessary before a raiyat can be ejected.

*Babu Shiba Prasanna Bhattacharjee* for the Appellants.

*Babus Mohendra Nath Roy and Krishna Proshad Saibadhicary* for the Respondents.

A. T. M.

Appeal dismissed.

# THE Calcutta Weekly Notes.

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MONDAY, MAY 17, 1909.

[No. 27]

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### REPORTS (See Index.)

THE CRIMINAL LAW AMENDMENT ACT WAS PASSED at one sitting of the Viceroy's Legislative Council. No opportunity was given to the public to criticise it and no attempt was made to ascertain the opinion of those whose opinion might carry weight with the public. The provision for a Special Tribunal of High Court Judges met with general approval. But the procedure for holding the preliminary enquiry behind the back of the accused and without even giving him an opportunity of having the proceedings watched on his behalf by his solicitor, pleader or counsel was generally condemned. We predicted at the time that this arbitrary procedure was likely to be abused by the police. We do not at all wonder that our predictions in this respect have come true so soon. What can be more condemnatory of the police method in this country, as also of the new procedure which gives them greater opportunity of tampering with the evidence and the records, than the observations of the Special Tribunal in the recent Barrah dacoity case?

THE LEARNED CHIEF JUSTICE AFTER MENTIONING the "improper" and "sinister influences" of the police on the prosecution witnesses and their "deplorable interference" with the evidence which he generally described as tainted, proceeded to give an account of the attempt on their part to suppress a portion of the record containing important evidence and to get out of the Court's way the officer who had recorded the evidence at one of the preliminary stages.

In September last certain of the witnesses and notably Barkat Bepari had been examined before a Deputy Magistrate

in connection with the offence to which this trial relates. The Deputy Magistrate recorded this evidence, and, attaching it to his report, forwarded the papers to their proper destination. In the paper-book prepared by the prosecution, the report appears, but not the depositions. When this was brought to our notice we directed the original record, which was in Court to be examined, and then it was found that, though the report was there, the depositions had been detached and could not be found. We were then told that the depositions were at Dacca. A telegram was directed to be sent requiring them to be forwarded. The next morning we were informed that the depositions were not at Dacca but had all the time been here in Calcutta in the keeping of the police in charge of this case. When they were produced it at once became apparent that these depositions were of great value to the defence, but to utilise them to their fullest effect, it was necessary to examine the Deputy Magistrate by whom they had been recorded. It was by the merest chance this could be done, for, on an assurance previously given to the Court by the prosecution that this gentleman's evidence would not be required, we, with the consent of counsel appearing for the accused, had dispensed with his presence and had given him permission to return to his duties. Fortunately before he had actually left Calcutta, the depositions had been produced and the Deputy Magistrate was examined with results unquestionably of value to the defence.

WE ADMIRE THE FORBEARANCE WITH WHICH THEIR Lordships have treated the officers who were responsible for such reprehensible tricks in a case in which several persons were charged with capital offences. Some more drastic and far-reaching measures are needed for reforming the police methods of prosecution in this country than could be effected by summary contempt proceedings. It will be for the Government of Eastern Bengal and Assam to take such steps in connection with this case as would prevent a repetition of such conduct on the part of the police in the future. The Government of India should also seriously consider now whether they would preserve in the statute book provisions which will demoralize the police to a greater depth and may conceivably drag down with them the subordinate judiciary as well.

THE HON'BLE THE CHIEF JUSTICE POINTS OUT a further instance of the police method of manipulating records.

The other matter of complaint also has reference to the preparation of the paper-book. At page 185 of the book is printed the record of the identification proceedings on the 5th October last at Hooghly Jail, and in column 7 are printed the names, and with one exception, the description of the witnesses, in whose presence the identification was made. The exception is in the case of the witness described as

**Bimalananda.** It was elicited in the course of cross-examination that the person described as Bimalananda was Bimalananda Roy Chowdhuri, Sub-Inspector of Police, who had taken a leading part in these identification proceedings. This led to an examination of the original record when it was discovered that the printed copy differed from this original in that it failed to give Bimalananda's name in full, or to describe him as a Sub-Inspector of Police. Now it is obvious that this involved an omission of a matter of considerable import in relation to the case sought to be established by the defence.

## CRIMINAL CASES OF 1908.

(Continued from p. clxvi).

**SECURITY TO KEEP THE PEACE.**—[Contents of order under sec. 112]. The setting forth of the information received from a police-officer in terms of section 110 was held sufficient compliance with the section (*Chintamon v. Emperor*, 35 Cal. 243). This is, we submit, entirely wrong. In the first place the ordinary grammatical meaning of the words of sec. 112 "setting forth the substance of the information received" is much more than a re-copying of the sub-clauses of sec. 110. If the object of sec. 112 is considered the matter becomes clear. It is the intention of the Code that the accused should have at his own house the fullest information as to the reasons why his liberty is in danger (*Re Daulat*, 14 All. 45, 47; *Re Jai Prokash*, 6 All. 26; *Queen v. Prosono*, 22 W. R. Cr. 36, 37). The substance of the information notifies to the accused what is the matter which he has to answer (*Re Mithu*, 27 All. 172, 173). The Magistrate should give notice to the party of the particular conduct complained of and which is indicative of an intention to commit a breach of the peace (*Ramkissore v. Arip*, 21 W. R. Cr. 6; H. C. Pro., 29 Aug. 1876, Weir 719, 720). The parties are entitled to something more than a mere assertion by the Magistrate that he was informed that a breach of the peace was likely, and such an order does not adequately or properly disclose the substance of the report or information received (*Queen-Empress v. Nathu*, 6 All. 214, 219). The association which gives the Magistrate jurisdiction to deal in one proceeding with several persons must be alleged or implied in the initiatory order (*Srikanta v. Emperor*, 9 C. W. N. 868, 904). Then further, from the fact that no charge is necessary, it is obvious that the order stands in place of the charge, and must give further particulars than a mere repetition of the sub-clauses of a section gives. Again sec. 117 (1) requires the order under sec. 112 to be read and explained before the Magistrate "inquires into the truth of the information on which he has acted." It is clear that the conduct and acts complained of or charged in the information must be proved. The Court is pinned down to these facts, and it is, therefore, necessary that the order under sec. 112 should contain these specific facts. No doubt it has been held in some cases that non-specification of the substance of the informa-

tion is not fatal where the parties were aware of it or were not prejudiced (3 All. 345; 7 N. W. P. 233; 12 Cal. 520, 521; 15 W. R. 43, 44), it has also been held that it is essential to the validity of the order under sec. 112 to set forth the particulars thereby required (3 N. W. P. 96, 98; 2 Shome's Rep. 15; and see 10 C. L. R. 430, 431; 30 Mad. 282, 283).

[*Wrongful Act.—General exercise of rights*]. The general question as to the exercise of one's rights has been discussed in several cases. If the existence of the right claimed by one party and objected to by another is not quite patent, the Magistrate should try to ascertain their respective rights and not treat them as matters exclusively for the Civil Courts, and should then bind down the party who has not the legal right. If they are unascertainable, both parties ought to be bound down (*Dindaya v. Emperor*, 34 Cal. 935).

[*One-side order*]. One party should not alone be bound down when the order would be prejudicial to the exercise of rights his (*Maigh v. Ambica*, 5 C. L. J. 447; *Bibee v. Umatal*, 11 C. W. N. 121; *Bepin v. Pranakul*, 11 C. W. N. 176). In a *bona fide* dispute as to the possession of land, it is unfair to bind down one party as it would affect his rights against the other (*Bainsab v. Emperor*, 12 C. W. N. 606).

[*Right of public procession*]. A party insisting on his right to take a procession through a particular road, objected to by another party, cannot be bound down unless the act is proved to be wrongful, or that the processionists are themselves likely to cause a breach (*Peroze v. Emperor*, 12 C. W. N. 703). The right to conduct a marriage procession along the public highway can only be questioned by the Magistrate to secure the preservation of the public peace (1 Mad. H. C. R. 50, 51; see *Sambalinga v. Vembara*, Mad. Sudder Dewany Rep. (1857), p. 233). Sec. 144 is the only law which could justify interference with the rights of the public to use a highway as long as they do not commit nuisance, or their conduct does not give rise to a breach of the peace (H. C. Pro., 22 Nov. 1879, Weir 761, 762; see *Empress v. Tucker*, 7 Bom. 42). No persons have a right to obstruct others lawfully using a public street, and customs to the contrary based on religious intolerance cannot be recognized (*Re Ramannuja*, Weir 765; *Re Pacha*, Weir 766, 767). A general order by a Magistrate directing the stopping of all music when the procession is passing a place of worship, passed in anticipation of a breach, before the occasion arose, is *ultra vires* (*Muthialu v. Bapun*, 2 Mad. 140, 142; *Re Pedda*, Weir 740; *Sundram v. Queek*, 6 Mad. 203, 213, 214, 216, 217, 220), but not a temporary prohibition (*Re Pedda*, Weir 740). The Magistrate should simply allow the parties to exercise their rights taking care, through the police to guard against breaches of the peace (*Re Chidambara*, Weir 762).

[Evidence]. In cases under Chap. VIII, especially where no previous conviction is proved, the Magistrate ought to test the prosecution evidence with great care (*Chintamon v. Emperor*, 35 Cal. 243). An agreement to be bound down cannot be the basis of an order under sec. 107, which requires proof of the likelihood of a breach of the peace. (*Ram Chandra v. Emperor*, 35 Cal. 674). A petition by a party detained in custody denying the likelihood of his breaking the peace, and agreeing not to take *tazias* along the road objected to, even if voluntarily made, is not sufficient in the absence of evidence (*Feroze v. Emperor*, 12 C. W. N. 703, 705). In a long series of rulings under the Codes of 1861, 1872 and 1882 it was held that evidence taken during the proceedings prior to the order was necessary (4 B. L. R. F. B. 46: 12 W. R. Cr. 60: 10 W. R. Cr. 1, 46, 47: 7 W. R. Cr. 59: 5 Bom. H. C. R. 105: 11 W. R. Cr. 59: 6 Bom. H. C. R. 1: 12 W. R. Cr. 54: 8 Bom. H. C. R. 163: 2 N. W. P. 431, 461: 6 B. L. R. App. 148: 10 C. L. R. 430: 16 W. R. Cr. 45: 7 W. R. Cr. 35: 18 W. R. Cr. 2: 20 W. R. Cr. 18, 68: 5 N. W. P. 80: 21 W. R. Cr. 6, 12, 13, 28: 1 C. L. R. 48: 3 C. L. R. 72: 22 W. R. Cr. 79: 7 N. W. P. 223: 6 All. 244, 219). The proceedings in a case under sec. 107 must be based on legal evidence and not on hearsay and extraneous matters (*Emperor v. Bidhyapati*, 25 All. 273, 274: *Sykes v. Empress*, 3 Shome's Rep. 37). If respectable persons able to prove facts do not come forward with evidence the Magistrate is not on that account entitled to act on inadequate proof obtained *aliunde* (*Empress v. Babua*, 6 All. 132). Mere admission of presence at a riot is not sufficient evidence (*Queen v. Kadan*, 5 Mad. 380).

E. H. MONNIER.

(To be continued.)

### Review.

A DIGEST OF THE LAW OF AGENCY. By William Bowstead, of the Middle Temple and South Eastern Circuit, Barrister-at-Law. Fourth edition. London. Sweet and Maxwell, Limited, 3, Chancery Lane. 1909.

We welcome a new edition of this very useful publication. Since the last edition was noticed in these columns two years ago, the scope and operation of the Factors Act have been considered by the Court of Appeal in two cases, *Oppenheimer v. Frazer*, (1907) 2 K. B. 50 and *Oppenheimer v. Attenborough*, (1908) 1 K. B. 221 and they are duly noticed in the present edition, and generally references to reported cases are brought down to the end of 1908. The arrangement of the subject-matter follows that of a Code. The principles of law are extracted from the reported cases and are embodied in the form of more or less general propositions and these are followed by explanatory notes, wherever necessary, and are further illustrated

by instances of their application from reported cases. The references to the cases are set out in the foot-notes. The subject-index at the end is very full and makes an otherwise well-ordered treatise still more handy for purposes of reference.

### Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before CASPERSZ and RYVES, J.J. CRIMINAL REVISION No. 62 OF 1909. BEJOY MADHAB CHOWDHURY AND ANR., 1st Party, Petitioners v. CHANDRA NATH CHAKROVERTY, 2nd Party, Opposite Party. 20th April 1909.

*Criminal Procedure Code, sec. 146—Attaching property without taking evidence—Jurisdiction, question of.*

In a proceeding under sec. 145, Cr. P. C., the parties were asked to file their written statements and to produce their evidence. On the failure of the parties to do the same in due time the Magistrate attached the land in dispute under sec. 146, Cr. P. C., on the ground that he was unable to come to any decision regarding the possession of either party as there was no evidence produced on either side. The Petitioner moved the High Court and obtained this Rule on the ground *inter alia* that the Magistrate refused to exercise jurisdiction vested in him, inasmuch as he did not give more time for regular proceedings to be followed.

Their Lordships observed:—

"The case of *Sheikh Munserali v. Mahmullah*, 12 C. W. N. 896, upon which the learned vakil for the Petitioner relies, was one where the Magistrate had not given sufficient time for regular proceedings to be followed, and the learned Judges therefore set aside the order attaching the subjects of dispute under sec. 146, Cr. P. C. A similar order has been passed in this case now before us, but we are of opinion that the Extra Assistant Commissioner of Sunamunge did give sufficient time to the parties. He drew up proceedings on the 1st September 1908 but the parties did not file written statements and the first party, the Petitioners, prayed for a local investigation. That prayer was not acceded to, because as we find in the explanation now submitted, the disputed land was situated at a distance of two days' journey from Sunamunge. As neither party adduced any evidence and an interval of more than 2 months elapsed, the Magistrate on the 7th November, passed an order under sec. 146 of the Code. We are constrained to say that such an order was not without jurisdiction."

Babu Sasadhar Roy for the Petitioners.

B. C.

Rule discharged.



**CIVIL APPELLATE JURISDICTION.** Before MOOKERJEE, J. APPEAL FROM APPELLATE DECREE NO. 2804 OF 1907. NILMONY SINGHA, Defendant No. 1, Appellant *v.* HARADHAN DASS (Plaintiff) AND SRIMATI KHETRA MOYI DOSSYA AND OTHERS (remaining Defendants), Respondents. Heard, 5th and 6th April. Judgment, 30th April 1909.

*Interest on money lent—Paddy—Limitation Act (XV of 1877), Sch. II, Art. 132—Interest charged on immoveable property—Interest payable on earlier date than principal—Compound interest, rate of, higher than that of simple interest—Penalty.*

The appeal was on behalf of the Defendant in an action for enforcement of a mortgage security executed by him in favour of the Plaintiff-Respondent on the 17th September 1893. The mortgage bond recited that the mortgagor borrowed Rs. 100 and covenanted to give 5 *maps* and 6 *shallyes* of good paddy as interest in the month of Pous every year. He further agreed that if there was default in payment of paddy in the shape of interest he would pay three *salis* of paddy as interest *per map* per annum. There was also a covenant that the principal amount would be repaid on the 12th April 1894. The deed recited that certain properties were mortgaged to secure payment of the principal, interest in kind, as well as interest on such interest. The first instalment of interest fell due in Pous 1300 (12th January 1894). The substantial points in controversy were:—(1) Whether the claim for interest which accrued more than 6 years before the suit was barred by limitation: (2) Whether the claim for the first instalment of interest which accrued on the 12th January 1894, was barred by limitation: and (3) Whether the agreement to pay interest on interest at a rate higher than the original rate of interest was in the nature of a penalty and consequently unenforceable.

*Held*—That the interest which was the value of the paddy, though variable from time to time was charged upon the mortgaged premises and Art. 132 of the Limitation Act was applicable.

In the case of bonds where no distinction is made between principal and interest and different dates are not fixed for their payments, no portion of the claim for interest could be barred if the claim for principal was not barred. But where, as here, the repayment of the principal was postponed and the interest was made payable on an earlier date than the principal and both were expressly charged upon the mortgaged premises the mortgagee would be entitled to sue for interest as soon as it fell due though the principal amount had not become due.

That compound interest at a higher rate than the rate of simple interest is a penalty which cannot be allowed.

*Babus Digambur Chatterjee and Tara Prasanna Chatterjee* for the Appellant.

*Babu Gunada Charan sen* (for *Babu Joy Gopal Ghosha*) for the Respondents.

A. T. M.

*Appeal Allowed.*

**CIVIL APPELLATE JURISDICTION.** Before CARNDUFF, J. APPEAL FROM APPELLATE DECREE NO. 1729 OF 1907. RAJENDRA KUMAR BOSE, Appellant *v.* GANGARAM KOYAL AND OTHERS, Respondents. Heard, 15th April. Judgment, 21st April 1909.

*Suit to set aside order in compromise decree relating to mesne profits—Maintainability—Decree—Mesne profits.*

The appeal arose out of a litigation commencing with a suit brought by the present Appellant against the present Respondents for recovery of possession after partition of a share of certain land, together with a declaration of title and mesne profits. That suit came on for hearing on the 30th September 1904, on which date issues were framed, the first and third expressly raising the question whether the Appellant had—as alleged by him but denied by the Respondent—been dispossessed by the Respondent and so become entitled to mesne profits from the latter. The trial, however, did not proceed, the parties having apparently come to some arrangement, the result of which was thus recorded by the Munsif. "The Defendant's pleader argues that there should be effected a partition before deciding the question as to the amount of mesne profits recoverable by the Plaintiff and the question who should be liable for the costs of the institution. I accordingly decree the suit in an intermediate form and order that let there be a partition of the Plaintiff's moiety share by metes and bounds, the question as to liability for costs for institution and the amount of mesne profits recoverable by the Plaintiff being reserved for decision hereafter." A decree was subsequently passed on compromise. The Appellant eventually proceeded to take out execution in respect of the mesne profits thus awarded to him and the suit which gave rise to the present appeal, was brought by the Respondent for the setting aside of so much of the decree as related to mesne profits, the contention as put forward at the trial being that that part had been made by mistake and should be held to be null and void. The Respondents succeeded in both the Court of first instance and the lower Appellate Court.

*Held*—That the suit was maintainable, *Jogeswar v. Ganga*, (1903) 8 C. W. N. 473, followed.

*Sadho v. Golab*, (1899) 3 C. W. N. 375 and *Chand Mea v. Srimati Asima*, (1906) 10 C. W. N. 1024, distinguished.

*Babus Golap Chunder Sirkar and Sailendra Nath Palit* for the Appellant.

*Babu Provash Chunder Mitter* for the Respondents.

A. T. M.

*Appeal dismissed.*

# THE Calcutta Weekly Notes.

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[No. 28]

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### REPORTS (See Index.)

WE ARE NOT AWARE OF THE REASONS FOR THE delay on the part of the Government of India in the appointment of an Advocate-General for Bengal. But the consequence of this leisurely way of doing things may be serious, as was actually found to be the case, to persons undergoing trial at the High Court Criminal Sessions. If in any case it is found necessary that *nolle prosequi* should be entered, there is no Advocate-General to do so. A conviction, and it may be on a capital charge, may be of questionable legality and in such cases it may be necessary to obtain the Advocate-General's *fiat* for bringing the matter before a Full Court. But in the absence of the Advocate-General, unless the Judge is generous enough to make a reference himself, the consequence of the vacancy may be fatal to the accused. Then there are matters of civil procedure where proceedings cannot be initiated without the leave of the Advocate-General. In spite of all this why the Government should leave such an important office vacant so long we cannot understand. We cannot comprehend any better the wisdom of the course of investing any person with the garb of the Advocate-General for the mere satisfaction of the letters of the law and thus saving legal procedure from illegality. Such a course is unprecedented in the history of this office or that of any Indian High Court. Are we going

back to the days when fictitious persons used to be called in from the Courts' corridor for suffering recovery and barring entails and so lending a colour of legality to a fictitious procedure and thus avoiding the strict provisions of the law? There might have been justification for such procedure in the chequered history of the English law of Real Property but the days of fiction are now over.

• WE ARE UNABLE TO APPRECIATE THE DIFFICULTIES of Government with regard to the appointment of an Advocate-General from amongst the members of the Calcutta Bar. Until recently this office has been held by such distinguished men as Sir Charles Paul, Sir Griffith Evans, Mr. J. T. Woodroffe, Mr. P. O'Kinealy and Mr. S. P. Sinha. Are we to believe that there are no men at the Calcutta Bar to take their place? Since the resignation of the office of Standing Counsel by Mr. Arthur Phillips on his being superseded in his legitimate claim to the office of the Advocate-General in the absence of Sir Charles Paul, no distinguished leader of the Calcutta Bar has been found willing to accept the office of the Standing Counsel, which Mr. Phillips resigned under a sense of wrong. Since then the prestige and position of the law officers of the Crown have certainly gone down. But still if the Government of India is able to find a suitable Law Member of the Viceroy's Council from the Calcutta Bar, it is difficult to believe that they cannot obtain a competent Advocate-General from the same Bar. When able lawyers are available in other provinces for filling the highest judicial appointments and Bengal has furnished a Law Member it would be a slur on the Calcutta Bar and on this province as well, should an Advocate-General be recruited from outside. An Advocate-General from England will have to spend some years in the country before he can make himself familiar with the laws, manners, customs and usages of the country and make himself useful to the Government.

IT IS OF THE UTMOST IMPORTANCE IN THEIR OWN interest as also in the public interest that the Government should rehabilitate the position and prestige of the law officers of the Crown. Members of the Calcutta Bar can certainly be relied on for serving the Government faithfully and loyally in

the discharge of the responsible duties of the Advocate-General. It is said, however, that there are some advisers of Government who would like to see the law officers of the Crown play second fiddle to the police and the subordinate executive officers of Government. No self-respecting member of the Bar, be he recruited from England or from this country, would care to do this. In the Advocate-General Government should have an honest adviser and the need for such an adviser to the State is indeed great. We do not believe that the responsible heads of Government feel any nervousness with regard to such advice from its law officers but there are subordinate officers who do not certainly appreciate it. Let us hope that the voice of such officers will not influence the Government in the least in the selection of an Advocate-General.

THE APPOINTMENT OF SIR BIPIN KRISHNA BOSE and Pandit Sundar Lal as Judicial Commissioners in their respective provinces cannot be regarded as mere acts of the local Governments concerned, but must be looked upon as a partial fulfilment of the Royal pledges that all appointments under the Crown are open to capable Indians. No doubt, Indians have before this been appointed to even the highest judicial offices in the more progressive provinces, but this is surely the first time that Indians have been selected to fill such positions in the less advanced provinces. As regards the selections, they are unexceptionable. Sir Bipin Krishna Bose has occupied the leading position in every respect amongst lawyers in the Central Provinces. He is not merely a capable lawyer but a man of such genuine good nature, mature judgment, sterling honesty and general moral excellence, that he is loved and respected alike in Bengal and the Central Provinces. His deep interest in the welfare of the community and in the cause of peace and good government made him a most valued adviser to the local Government and led to his selection as a member of the Viceroy's Legislative Council on more than one occasion. He has always been in deep sympathy with all progressive movements and has been ever keen for the promotion of the *swadeshi* industries. His natural amiability of character and general kindliness of manners have made him numerous friends amongst all communities. Both the Government of India and the local Government are to be congratulated for having made such an excellent selection. Now that the Government of India are satisfied that they can secure really first class men for high judicial appointments, they ought to make an equally earnest endeavour for securing the very best men available for the High Court benches.

THE APPOINTMENT OF PANDIT SUNDAR LAL AS Additional Judicial Commissioner of Oudh is of equal significance. The Judicial Commissioner is shortly to proceed on leave and it is understood that Pandit Sundar Lal is to act as the Judicial Commissioner. We presume that Pandit Sundar Lal has accepted this appointment at a considerable sacrifice. He enjoyed the leading practice amongst the vakils of the Allahabad High Court and as such had a very large professional income. It must be his sense of duty to the community that has prevailed upon him to accept this judicial office. Pandit Sundar Lal has set a good example and it will be certainly to the credit of the legal profession, if the leading men at the bar would regard the acceptance of responsible judicial positions as a matter of duty they owe to themselves and to the community. Pandit Sundar Lal has never been a pushing man but his genuine merit, good character, and moderation of views, combined with enlightened public spirit have made him universally respected. There can be no question that he will discharge the duties of a judicial officer with great ability. We should, however, like to see him on the Bench of the Allahabad High Court before long. He will be an acquisition to that Bench and appointments like these would go to enhance the strength and prestige of the High Courts in India.

#### CRIMINAL CASES OF 1908.

(Continued from p. clxxxii).

[*Joinder of persons*]. A joinder in one trial of opposite parties is an illegality vitiating the proceedings (*Ganapathi v. Emperor*, 31 Mad. 276; *Srish v. Emperor*, 2 C. L. J. 651; *Pran v. Emperor*, 8 C. W. N. 180; *Kamal v. King-Emperor*, 11 C. W. N. 472). Before the Privy Council decision a misjoinder under sec. 117 was held to be an irregularity not affecting the final order unless the accused had been prejudiced (9 All. 452; *Empress v. Bochan*, All. W. N. (1881) 28; 6 All. 214).

[*Finding*]. Where there are several accused there must be a specific finding against each of acts rendering him individually liable under the section (*Ajodhya v. Emperor*, 35 Cal. 929; see also *Queen-Empress v. Abdul*, 9 All. 452; *Queen-Empress v. Nathu*, 6 All. 214; *Queen v. Kidar*, 7 N. W. P. 233, 236; *Re Kassim*, 10 C. L. R. 335; *Emperor v. Purshottam*, 26 Bom. 418, 422), and not collectively liable (*Pran v. Emperor*, 8 C. W. N. 180). An order under the section should not be made where rioting occurred on the spur of the moment and there is no likelihood of a repetition of it (*Islam v. Emperor*, 12 C. W. N. lxxxiii).

[*Remand to custody*]. A Magistrate has no jurisdiction to remand to custody, under sec. 107

(4) a person not sent to him under sub-sec. (3), and sec. 36 when read with the sub-section does not confer such jurisdiction (*Chidambaram v. Emperor*, 31 Mad. 135).

**SECURITY FOR GOOD BEHAVIOUR.**—[Cross-examination of witnesses]. Sec. 256 has been held not to apply to an inquiry under sec. 117. (*Chintamon v. Emperor*, 35 Cal. 243). This, it is submitted, is erroneous. Sec. 117 (2) enacts that such inquiry "shall be made as nearly as may be practicable," where the order requires security for good behaviour, as in warrant cases. No doubt in a warrant case a Magistrate may frame a charge after the examination of some prosecution witnesses and require the accused to cross-examine them. But a Magistrate can frame a charge even in a case under sec. 117 for good behaviour and then a cross-examination after the charge is clearly practicable. But even if in the latter proceeding he does not draw up a charge, the cross-examination of the prosecution witnesses at the close of the prosecution still impracticable. The right of cross-examination in a warrant case given by sec. 256 exists notwithstanding that the Magistrate has omitted to frame a charge. The Magistrate cannot deprive an accused on his trial in such a case of this right by refusing or omitting to draw up a charge. The position of a party to an inquiry under sec. 117, when no charge has been drawn, is, as regards the right of cross-examination under sec. 256, the same as that of an accused on trial where the Magistrate has omitted the charge.

[Defence witnesses]. Sec. 257 applies to inquiries under sec. 117. (*Emperor v. Purshottam*, 26 Bom. 418, 420: see *Wahid v. Emperor*, 11 C. W. N. 798). But where an attempt is made to protract the examination in chief of the defence witnesses to such an extent so as to delay, if not prevent, the final termination of the case, the Magistrate is justified in refusing process for all the witnesses (*Chintamon v. Emperor*, supra). In a similar case the Magistrate may limit the duration of the speech for the defence. [*Ibid*].

**GENERAL REPUTATION.**—[Reputation, meaning of]. A man's general reputation is the reputation he has in the place where he lives amongst his townsmen (*Rai Ishri*, 23 Cal. 621; *Ketabai v. Queen-Empress*, 27 Cal. 993, 995), but a man may have one reputation in one place and quite another in a different locality, and evidence of his reputation at the latter place is then admissible (*Chintamon v. Emperor*, 35 Cal. 243).

[Evidence of reputation]. (a) Evidence of the commission of an offence is not legally necessary to support an order under sec. 118: evidence of repute is sufficient (*Queen-Empress v. Kandhaia*, 7 All. 67, 71; *Re Pedda*, 3 Mad. 238, 240), (b) Evidence of rumour is mere hearsay evidence of a particular fact, and is not evidence of general repute under sec. 117. Statements by witnesses

of things they have heard from other people is not such evidence. Evidence of repute is a different thing (*Rai Ishri v. Queen-Empress*, 23 Cal. 621). If a man who lives in a particular place is looked upon by his fellow townsmen, whether they know him or not, as a man of good repute, that is strong evidence of his being of good character. But if the body of townsmen who know him look upon him as a dangerous man, and a man of bad habits, that is strong evidence of his bad character (*Rai Ishri v. Queen-Empress*, supra). Evidence of general suspicion derived from hearsay, from people whom the witnesses cannot name, when they themselves have no personal knowledge of, or acquaintance with, a person, cannot be safely acted upon (*Kasai v. Emperor*, 29 Cal. 779, 781). So the mere statements of witnesses that they suspect or are under the impression that the accused are thieves, etc., when no fact is mentioned to indicate any sufficient reason for such impression or suspicion (*Alep v. King-Emperor*, 11 C. W. N. 413), or when their opinion is based on previous convictions only, and no instance of actual theft, etc., or direct evidence of association for the purpose of committing theft, etc. is produced (*Gholam v. Emperor*, 8 C. W. N. 543, 544).

Sections 505 and 506 of the Code of 1872 distinguished cases where, from evidence of general character, it appeared that a man was by repute a robber, etc., and where from such evidence it appeared he was by habit a robber, etc. It was held that the opinion of witnesses as to the habits of a suspected person was not of much value, unless in support of that opinion they adduced instances of misconduct imputed, but that such evidence was not without value to prove repute, though they could not connect the suspected person with the actual commission of crime (*Re Pedda*, 3 Mad. 238).

[Proof of habit]. Evidence of acts of misconduct committed years ago is admissible to show formation of the habit, but, unless supplemented by evidence of misconduct within a year or so before the institution of proceedings, does not justify an order under sec. 118. (*Wahid v. Emperor*, 11 C. W. N. 789: see *Emperor v. Nepal*, 13 C. W. N. 318).

E. H. MONNIER.

(To be continued.)

#### CURRENT INDIAN CASES.

**RANDUPARAYIL v. MEROTH KUNHI**, I. L. R. 32 Mad. 1. *Malabar Compensation for Tenants' Improvement Act*.

Sec. 7 of the Malabar Compensation for Tenants' Improvement Act of 1887 which is sec. 19 of the Act of 1900 precludes parties from contracting themselves out of the Act by any contract made after 1st January 1886 but it does not affect the

validity of contracts made prior to 1st January 1886, whether the improvements were made before or after the coming into operation of the Act of 1887.

**CHEDAMBARAM v. EMPEROR**, I. L. R. 32 Mad. 3. *Penal Code sec. 124A—Code of Criminal Procedure, secs. 196, 225, 537.*

It is not necessary that the actual complaint referred to in sec. 196, C. Cr. P., must be expressly authorised by the local Government. What that section requires is that the complaint should be made upon authority from the local Government.

A complaint is none the less a complaint because it is put in by a police-officer. "The report of a police-officer" must be some statement made in connection with, or at least under colour of, the duty of the maker as a police-officer.

A complaint under sec. 196, C. Cr. P., relating to sedition is not bad because it did not set out the speeches or the alleged seditious words which were the subject-matter of the subsequent charge.

A charge relating to sedition is defective if it does not set out the speeches or the passages in the speeches which the prosecution allege to be seditious. Formal defects shall not in themselves vitiate a charge. The principle of illustration (b) to sec. 225, C. Cr. P., applied to the present case.

The speeches in question were held to constitute offences punishable under sec. 124A, I. P. C.

**EMPEROR v. MADIGA**, I. L. R. 32 Mad. 47. *C. Cr. P., sec. 339 (3).*

"If the sanction of the High Court is desired under sec. 339 (3), C. Cr. P., there should be a motion on behalf of the crown. We therefore decline to do anything on the Sessions Judge's letter" (Per Munro and Sankaran Nair, JJ.).

## Review.

THE DIGEST OF INDIAN CASES for 1908 with a collection of cases overruled, followed, dissented from and referred to. By S. Srinivasa Aiyar, B.A., B.L., Vakil, High Court, Madras. Compiler of the Digest of Indian Cases, for 1901—1905, 1906, 1907, Madras. Printed at the Ananda Press. 1909.

We have always found Mr. Srinivasa Aiyar's digests to be both handy and useful. The present issue is no exception to the rule. The selection of subject headings, as also of subordinate headings for purposes of cross-reference, is judiciously made and the case notes are brief and to the point.

## Notes of Cases. ENGLISH LAW COURTS.

**COURT OF APPEAL.**—*Nussey v. John Edward Eddison*. Before the MASTER OF THE ROLLS, LORDS JUSTICES FLETCHER MOULTON and BUCKLEY. 2nd April 1909.

*The erection of a hoarding for bill-posting is "a building erected for carrying on an offensive trade."*

The Plaintiff and the Defendant Eddison were owners of neighbouring plots of land. The Defendant had covenanted that he would fence off his plots from the road which fence should consist of a dwarf wall and that no building should be erected upon the plots "for the carrying on of any noisy, noisome, offensive, or dangerous trade or calling." The Defendant leased his plots to an advertising company which erected thereon a hoarding of a permanent nature 156 ft. long and 15 ft. high, for advertising posters. The Plaintiff's suit for a mandatory injunction to compel the Defendant to pull down the hoarding was decreed by the Court below. Hence this appeal.

LORD JUSTICE BUCKLEY (The MASTER OF THE ROLLS concurring, and LORD JUSTICE FLETCHER MOULTON delivering a dissenting judgment) dismissed the appeal. They held that the hoarding was a fence in violation of the covenant and that it was a building for carrying on an "offensive" trade. In their opinion the word "offensive" might mean "that which offends the ear, or the nose, or the eye, etc." Further, the word should be construed relatively to the person contemplated as enjoying the benefit of the stipulation.

LORD JUSTICE MOULTON agreed in the dismissal of the appeal in so far only as it related to a breach of the covenant as to fencing.

But in his opinion "offensive" means something *ejusdem generis* with "noisy, noisome, and dangerous"—viz., some trade the carrying of which physically interfered with the comfort of a neighbour. He was also of opinion that the hoarding was not a "building" within the meaning of the covenant.

*Messrs. Danckwerts, K. C., and Austen Cartwell* for the Appellant.

*Messrs. Buckmaster, K. C., and Errington* for the Respondent.

*Appeal dismissed.*

**COURT OF APPEAL.**—*Grande Maison D'Automobiles, Ltd. v. Bresford*. Before the LORD CHIEF JUSTICE OF ENGLAND, LORDS JUSTICES FLETCHER MOULTON and FARWELL. 28th April 1909.

*Contract—Obtaining a motor-car on the hire-purchase system not necessarily a purchase.*

This was the Defendant's appeal in a suit for the recovery of damages for breach of a contract

whereby it was agreed that the Defendant would employ the Plaintiffs as her agents in the event of her purchasing a new motor-car. The Defendant had obtained a new motor-car on the hire-purchase agreement through another firm.

The LORD CHIEF JUSTICE held that the effect of the hire-purchase agreement throughout was that it amounted to a hiring of a car and not to a purchase, giving only an option to purchase in certain events. The Lords Justices agreed.

*Mr. Clavell Salter, K. C., (with him Mr. Norman Craig) for the Plaintiffs.*

*Mr. Atkin, K. C., (with him Mr. Crawford) for the Defendant.*

*Appeal allowed.*

KING'S BENCH.—*Clarke v. The Mayor & Co., of West Ham.* Before MR. JUSTICE COMBRIDGE. 26th April 1909.

*Claim for electric shock on a tram-car.*

The Plaintiff suffered damage as a passenger while proceeding to a seat on the roof of one of the Defendant's cars through coming in contact with a standard which was electrically charged owing to a defect in the electrical conductor which was admittedly a breach of statutory rules. It was proved that the Plaintiff knew the Defendant's special notice which was:—"Passengers are being carried at less than the maximum authorized charges and every passenger is notified that in consideration thereof a passenger is only carried on the terms that the maximum amount recoverable from the corporation on account of any injury or damages suffered by a passenger and for which the corporation is legally liable is £25, except as above every passenger travels at his own risk." The jury awarded £500 damages. The Court upheld this verdict. The learned Judge observed: "The Defendants, in fact, had a toll which they exacted from all passengers alike of less than 1d per mile. They did not offer any alternative to the toll which they charged. He was bound to travel under the conditions sought to be imposed, or not to travel at all. It is settled law that a railway company—and for this purpose a tramway company seems to me to be in a similar position—may under certain circumstances limit their liability. They may, if they please, offer a free pass to a passenger, or permit him to travel under conditions which necessarily involve a greater risk to himself on payment of a lower fare or none, and call upon him to absolve them of their liability in whole or in part; *Gallin v. London & N. W. Ry. Co., Hall v. N. E. Ry. Co.*, (L. R. 10 Q. B. 437); but no case has been decided which permits a company which has a duty to serve the public at large in the matter of carriage, to limit their liability without giving the passenger the option to travel at their risk."

*Messrs. Simon, K. C., E. Browne, and Elkin, for the Plaintiff.*

*Messrs. Dickens, K. C., Danckwerts, K. C., and E. Morten for the Defendant.*

# PRIVY COUNCIL.

[APPEAL FROM PUNJAB.]

LORD ATKINSON.

LORD COLLINS.

SIR ARTHUR WILSON.

1909,  
1st April.

IN THE MATTER OF CHANDA SINGH.

*Privy Council—Special leave—Pleader—Misconduct—Financing litigant with a view to a share in the estate to be recovered—Champerly.*

The Petitioner was a pleader on the list of pleaders of the Chief Court of the Punjab practising in the District of Ferozepore in the Punjab. On the 16th March 1908, by an order of Mr. Justice Robertson and Mr. Justice Jonstone of the Chief Court the Petitioner's name was removed from the list on the ground of professional misconduct. By an order dated 5th February 1900 upon a petition for reconsideration under Rule 24, sec. 6 of the Act XVIII of 1879 the above order was varied and the Petitioner was suspended for three years.

The facts as disclosed in the petition were as follows:—

The Petitioner and one Partab Singh were close friends, and the Petitioner from time to time beginning in 1894 or thereabouts advanced him moneys for his domestic necessities and also for expenses of certain suits.

In March 1896 Partab Singh instituted a suit for pre-emption of certain lands against Mussammat Faltah Bano (Vendor) and Sham Sundar and others (Vendees) in the Court of District Judge, Ferozepore, and the Petitioner acted therein as pleader for the said Partab Singh. During the pendency of the said suit Partab Singh borrowed further sums of the Petitioner to carry on the said suit. The suit having been dismissed by the District Judge an appeal was filed in the Chief Court of the Punjab which on the 21st October 1899 was allowed and the suit remanded to the lower Court under sec. 562, Civil Procedure Code. During the pendency of the appeal Partab Singh again applied to the Petitioner for funds to carry on the appeal and on the 14th February 1897 an agreement was entered into between the Petitioner and Partab Singh by which Partab Singh in consideration of the sums already advanced and to be thereafter advanced stipulated to sell the Petitioner at a certain price such an amount of his land other than the land in suit as would liquidate the amount of money borrowed. Partab Singh died in 1901 leaving amongst others a wife Mussammat Ishar Kaur and

a minor son Harbans Singh surviving. On the 9th April 1901 on an application made by the Petitioner as pleader the Court substituted the name of Harbans Singh through his next friend one Bhagat Singh who was a near relative of the said Mussammat Ishar Kaur on the record in the place of Partab Singh and he was appointed next friend of the minor with, it was alleged, her full knowledge and consent.

By a judgment of the District Judge, dated the 23rd of December 1901, Harbans Singh was given a decree for possession conditional on his paying into Court within two months from the said date the sum of Rs. 8,310-11-9, but as he was unable to raise the said sum and unless the said sum was paid in within the two months the suit would stand dismissed with costs under sec. 214, Civil Procedure Code, the said Bhagat Singh on the 2nd January 1902, with the full knowledge and consent of the said Mussammat Ishar Kaur and two others her relatives applied to the Petitioner asking him to pay in the said sum and take over the land. Further, on the 17th January 1902, the said Bhagat Singh and the said Mussammat Ishar Kaur together with other the relatives of the said Harbans Singh came to the Petitioner and requested him to deposit the said sum in Court and take proprietary possession of the said land on his own behalf and that Bhagat Singh would cause mutation of names in respect of the said land to be effected in the Petitioner's favour. The above terms were recorded in a writing and signed by four persons present. On the 20th January 1902, Petitioner paid into Court the said sum and thereafter proceedings by way of execution were taken and possession recovered in March 1902.

In February 1902, Mussammat Ishar Kaur came accompanied by one of her relatives to the Petitioner and requested him to return the said agreement of 14th February 1897, as he had now possession of the land which the Petitioner accordingly did. In May 1902 both the Plaintiff and Defendants filed cross appeals from the judgment and decree of the District Judge in the Chief Court of the Punjab. On the 7th June 1902, Bhagat Singh as agreed applied to the Deputy Commissioner to have Petitioner's name recorded on the Mutation Register as proprietor of the said land on the ground that the Petitioner had purchased the same. The application was opposed by Mussammat Ishar Kaur at the hearing on the 17th June 1902, and mutation was effected in favour of Harbans Singh.

On the 19th June 1902, the Petitioner filed an application in the Chief Court under sec. 372 of the Civil Procedure Code (which application was supported by the affidavits of the Petitioner and Bhagat Singh) that Petitioner's name should be substituted upon the record for that of Harbans Singh in the cross appeals then pending in the

Chief Court. On the 10th July 1902, Mr. Justice Rattigan granted the said application "subject to all just exceptions."

On the 6th August 1902, the Petitioner instituted a suit against Harbans Singh (through his mother Mussammat Ishar Kaur) in the Court of the District Judge Ferozepore for possession of the said land or in the alternative for the sum of Rs. 9,250.

On the 18th September 1902, Harbans Singh by his next friend Mussammat Ishar Kaur filed three petitions praying that the said order of Mr. Justice Rattigan, dated the 10th July 1902, be set aside and that the name of Harbans Singh be allowed to remain upon the record, that Bhagat Singh be removed under sec. 446 of the Civil Procedure Code on the ground that he was acting in collusion with the Petitioner and that Mussammat Ishar Kaur's name be substituted as the minor's next friend; That Petitioner's power of Attorney as pleader of the said Harbans Singh be cancelled and that an enquiry be had into his conduct which it was alleged was fraudulent. At the hearing of the said three petitions on the 15th February 1903, by Mr. Justice Reid, the Divisional Judge, Ferozepore, was ordered to hold an enquiry into the matters referred to in the said three petitions and to make a report. The Divisional Judge held an enquiry and made his report which was dated the 5th May 1903. Thereafter Mr. Justice Reid passed orders on the said three petitions in the terms prayed for.

On the 27th May 1904, the District Judge dismissed Petitioner's suit against Harbans Singh. On the 10th June 1904, Petitioner filed an appeal in the Chief Court of the Punjab which came on for hearing before a Division Bench of the Chief Court composed of Mr. Justice Johnstone and Mr. Justice Lal Chand who on the 23rd April 1906, allowed the appeal to the extent of giving Petitioner a decree for Rs. 8,330-11-9, but refusing the claim for possession.

The cross appeals in the pre-emption suit were heard on the 5th January 1907, by a Division Bench of the Chief Court composed of Mr. Justice Johnstone and Mr. Justice Shah Din, and in the course of the hearing and in the judgments serious reflections were made on the professional conduct of the Petitioner and on the 21st June 1907, he was called upon by the judges of the Chief Court by a letter from the Registrar of the Chief Court, dated the 21st June 1907, to furnish an explanation of his conduct in reference to the said pre-emption case. He submitted his explanation on the 23rd June 1907, by a letter of that date.

The Petitioner's explanation was together with other papers placed before Mr. Justice Johnstone who as a member of both Division Benches had already expressed in the judgments of these Benches a strong view adverse to the Petitioner. On



the 14th July 1907, Mr. Justice Johnstone formulated in a note of that date the charges which he considered the Petitioner should be called upon to meet, at the same time recording his own strong view that "Petitioner's conduct was grossly unprofessional and extremely improper." He suggested in the said note that the papers should be placed before Mr. Justice Robertson for his views and the action which he thought ought to be taken.

By a letter of the 17th August 1907, from the Registrar of the said Chief Court Petitioner was informed that his explanation had been considered by the Honourable Judges of the Chief Court who had ordered an enquiry under sec. 13 of the Legal Practitioners Act 1879 and that the said enquiry would be held before a Division Bench on the 16th November 1908. A statement of the following charges accompanied the said letter:—

That Chanda Singh started from the beginning lending money to Partab Singh for the expenses of the pre-emption suit in which Partab Singh was his client.

That when he advanced further sums to his client in connection with the appeal in that case, he took from him an agreement of an improper kind (dated 17th February 1897) under which Chanda Singh was to spend and Partab Singh was to sell adequate proportion of the land to be pre-empted in consideration of Chanda Singh's expenditure.

That Bhagat Singh was really appointed guardian of the minor for the case as a tool of Chanda Singh and not with consent of Ishar Kaur.

That Bhagat Singh's letter (dated 2nd January 1902) to Chanda Singh asking him to pay the decretal sum, was collusive.

That it is not proved that Ishar Kaur ever asked Chanda Singh to pay the decree money and buy the land, and that the letters to that effect were never authorised by her.

That the agreement of 17th February 1897 was never returned to Ishar Kaur.

That the application for mutation in favour of Chanda Singh was made by his tool Bhagat Singh.

On the 16th November 1907, Petitioner duly attended with his counsel before a Division Bench composed of Mr. Justice Robertson and Mr. Justice Johnstone who ordered notice to be given to Harbans Singh aforesaid and also to the Government advocate to allow him to intervene if necessary. At the hearing Petitioner's counsel applied to be allowed to examine certain witnesses but the learned Judges before deciding the point considered that the Petitioner should "put in an affidavit stating in full what facts are traversed and what are admitted and what conclusions, &c., are traversed and what witnesses he desires to call to each particular point which he traverses." The case was then adjourned till 15th February 1908. Petitioner

duly filed an affidavit in which he admitted the facts set out in Charge 1 but urged that the said facts did not amount to mis-conduct. As to the second charge the agreement was admitted but it was denied that it was "of an improper kind." The third charge was denied, so also the 4th, 5th, 6th and 7th, and it was alleged that the contrary was the fact.

At the adjourned hearing on the 15th February 1908 the Division Bench refused to allow Petitioner to call certain witnesses (Nos. 1 and 2) on the ground that the matter upon which it was desired that these witnesses should be called had already been determined by a Division Bench in the case of the Petitioner against Harbans Singh and was not open to review unless, in the words of the said order, the Petitioner "can show that on the face of it that finding is incorrect." The said Division Bench also declined to consider charge 5 on the ground that it had already been determined. The Petitioner was informed that he must confine himself to the remaining charges.

By their order, dated the 16th March 1908, Mr. Justice Robertson and Mr. Justice Johnstone found against the Petitioner on all the charges and ordered that his name be removed from the list of pleaders and that he be prohibited from ever again acting as a legal practitioner of any class in the Punjab.

On the 10th April 1908 Petitioner filed a petition praying for a reconsideration of the above order under Rule 24 of sec. 6 of the Legal Practitioners Act (No. XVIII of 1879) on various grounds.

The Division Bench declined to enter into the merits of the case but in consideration of the expression of sincere contrition of the Petitioner's pleader at the said hearing and of the Petitioner being totally "blind and therefore incapacitated from earning his livelihood otherwise" reduced by their order of 8th February 1909 with the consent of the Chief Judge, the sentence to one of suspension for 3 years from the date of their order of 16th March 1908.

The Petitioner complained *inter alia* that no such enquiry as is contemplated by the Legal Practitioners Act was held in his case, that the Petitioner was not allowed any such opportunity of defending himself as is required by sec. 40 of the Legal Practitioners Act 1879; that the finding of fact in the judgment in the cross-appeals in the pre-emption suit to which the Petitioner was no party ought not to have been treated as any evidence against the Petitioner; that the findings of fact in the judgment of the Division Bench in the Petitioner's suit against Harbans Singh in which the burden of proof rested upon the Petitioner were not conclusive as appeared from the judgment itself; and that they ought not to have been treated as conclusive inasmuch as the pro-

fessional conduct of the Petitioner was not in issue in the said suit; that it was contrary to the natural rules of equity and justice that Mr. Justice Johnstone who had expressed a strongly adverse view on the professional conduct of the Petitioner before he had been heard and who had himself framed the charges should have sat upon the Division Bench. The Petitioner, further, submitted that an important point of law of general interest arose in the case, *viz.*, whether the agreement entered into by Petitioner with Partab Singh was tantamount to professional misconduct within the meaning of sec. 13 of the Legal Practitioners Act 1879.

*Mr. DeGruyther, K. C.* for the Petitioner after stating that Petitioner had been disbarred for 5 years asked their lordships to give leave to appeal on the grounds stated in the petition.

LORD ATKINSON said that champerty was not the law of India.

SIR A. WILSON added that that had been held over and over again.

Their Lordships said they should advise His Majesty to grant leave to appeal and notices to be issued to the Secretary of State for India and the Judge of the Chief Court of the Punjab to make any observations they might make and to appear at the hearing and be represented by Council if they chose to do so.

J. H. W. A.

*Leave allowed.*

## CALCUTTA HIGH COURT.

### Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before CASPERSZ and RYVES, JJ. REV. NO. 247 OF 1909. RAM ASRE LAL, Petitioner *v.* FAKIRA DUSADH, Opposite Party. 6th May 1909.

*Judgment not in accordance with law—Appellate judgment—What it should contain.*

The Petitioner was convicted by an Honorary Magistrate under secs. 352 and 447, I. P. C., and sentenced to pay a fine of Rs. 200. He appealed and the Joint Magistrate who heard the appeal delivered the following judgment:—"This appeal is filed by one only out of three persons accused. I have heard the arguments and have perused the record. The conviction is in my opinion thoroughly justified by the evidence on the record but the trying Magistrate should rather have convicted Ram Asre Lal of abetment, *i.e.*, under sec. 447 and sec. 352, I. P. C., read with sec. 114, I. P. C. &c."

The Petitioner then moved the High Court and obtained this rule.

Their Lordships observed:—

"The appellate judgment is not in accordance

with law. Standing by itself it is incomprehensible. The Appellate Court should have stated the facts and points for determination also, its decision thereupon and the reasons for such decision."

*Babu Surendra Nath Ghosal* for the Petitioner.

None for the Opposite Party.

B. C.

*Rule made absolute: and appeal directed to be re-heard according to law.*

CIVIL APPELLATE JURISDICTION. Before CARNDUFF, J. APPEAL FROM APPELLATE DECREE NO. 1774 OF 1907. UPENDRA NATH BAPALY AND OTHERS, Plaintiffs, Appellants *v.* KABUTAR KHAN AND OTHERS, Defendants, Respondents. 10th May 1909.

*Mourasi mokurrari lease by shebait—Solenama—Collusive and fraudulent—Non-occupancy right, acquisition of—Tresspasser.*

The appeal arose out of a suit brought by certain shebait for a declaration that a solenama in a certain rent suit as well as the decree based on it were fraudulent, collusive and inoperative, that no *mourasi mokurrari* right could be conferred on Defendant No. 1 under the solenama and decree and that the mortgage deed executed by Defendant No. 1 in favour of some of the other Defendants was also collusive and inoperative.

The land in suit belonged to an idol and the Plaintiffs and Defendants Nos. 5 to 24 were the shebait. In April 1905, the second Plaintiff came to know from Defendant No. 5 that he had had a rent suit instituted in the name of all the shebait and compromised it with Defendant No. 1 giving him in pursuance of the compromise a *mourasi mokurrari* right to the land.

The Court of first instance decreed the suit; but on appeal the lower Appellate Court dismissed the suit on the ground that the Appellants had no *locus standi* for bringing the suit in the present form. On appeal by the Plaintiffs,

*Held*—That although a person acting *bona fide* might acquire the right of a non-occupancy tenant and the right to notice before ejection, this could not be the result where the arrangement was collusive and fraudulent.

*Upendra Narain v. Protap Chunder* (8 C. W. N. 320) referred to.

*Babus Nilmadhub Bose and Sib Chunder Palit* for the Appellants.

*Babus Basant Kumar Bose and Shibaprasanna Bhattacharjee* for the Respondents.

A.T.M.

*Appeal allowed.*

# THE Calcutta Weekly Notes.

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### REPORTS (See Index.)

WE REGRET TO NOTICE THAT MR. JUSTICE LAL Mohan Das has had to take a month's leave owing to indisposition. Mr. Digambar Chatterjee, M.A., B.L., Vakil, has been appointed to officiate during his absence.

THE SELECTION OF MR. DIGAMBAR CHATTERJEE for the appointment is a singularly happy one and has given great satisfaction to the members of the profession as also to the public. Mr. Chatterjee commenced practice as a Vakil of this Court in 1882 after a successful University career. He is a good Sanskrit scholar and a sound lawyer. Simple and unostentatious to a degree, the honour has come to him, as it always should, unsought. His Lordship took his seat on the Bench on the 24th instant.

THE APPOINTMENT OF MR. W. G. GREGORY, Standing Counsel, as Officiating Advocate-General, has been gazetted.

WE UNDERSTAND THAT THE RELUCTANCE TO grant privilege leave to the Munsifs causes great hardship to many of these hard-worked officers. Under the existing rules the members of the Provincial Judicial Service are allowed privilege leave on only half pay, whereas the members of the corresponding Executive Service are entitled to privilege leave on full pay. The members of the Judicial Service are a great deal more hard-worked than the members of the executive service and therefore it is only fair that this disparity in the leave rules should be done away with. Instead of this, it seems as if the leave rules with regard to Munsifs are being made still more stringent. Since the Munsifs are entitled to pri-

vilege leave only on half pay, it is obvious that they would not care to take it unless they have pressing need for it. To ask them to produce medical certificate when they apply for privilege leave is to do them great injustice.

THERE IS SUCH A THING AS EXHAUSTION AFTER continued hard work for years when one feels the necessity of rest for a few months to replenish oneself with fresh energy. To refuse these hard-worked judicial officers this much-needed rest even on half pay results often in incapacitating them quite prematurely. It is a well-known fact that members of the Provincial Judicial Service are much more subject to diabetes and are as a rule more short-lived than their brethren in the executive service. This difference is certainly caused by the Provincial Judicial Service being undermanned and its leave rules being both illiberal and stringent. If ever it should be made into a rule that the members of the service should only get leave when they actually fall ill, it would have the effect of precipitating the general break-down that in their case comes off sufficiently early. We would, therefore, appeal to his Lordship the Chief Justice and the Hon'ble Judges at any rate to relax the stringency of the rules of privilege leave in their case for the present, and, if possible, in the near future place these most deserving officers on the same footing at least in respect of privilege leave as the members of the Provincial Executive Service.

IN THE CASE OF *Keshab Nath Bhattacharya v. Maniruddin Sarkar*, reported at p. 501 of this volume, their Lordships Sharfuddin and Cox, JJ., decided an important question as to the admissibility of evidence. The question was whether self-incriminating statements made in his deposition before the Criminal Court by an approver to whom pardon had been tendered, could be proved in an action for damages instituted against him by the complainant. Their Lordships held that the statements were admissible. There is not only no express provision of law making such statements inadmissible in evidence against the approver in a civil case but on the other hand such evidence is according to common sense as also the rules of evidence (see sec. 132, Evidence Act) the very "best" available in such a case against the approver.

IT WAS ARGUED IN DEFENCE THAT THE ADMISSION of such evidence against the approver would defeat the policy underlying sec. 339 of the Criminal Procedure Code. It is no concern of the law Courts to enquire into the consequences of giving effect to particular provisions of a statute or into the policy of the Legislature when those provisions are sufficiently clear. But there is no sufficient reason for believing that the policy of the Legislature is or need be such as to preclude such evidence from being treated as admissible in civil proceedings. For unless the State itself should undertake to compensate the injured party for the wrongs done to him by the approver, the State ought not to take upon itself to declare the immunity of the wrong-doer not only in regard to the punishment to be dealt out to him for the offence committed against the State, but also in regard to his liability to compensate the individual for the injury done to his person or property. The State can "pardon" the offence, but cannot with any propriety deprive the injured person of his undoubted right to be compensated by the wrong-doer. The decision referred to is therefore not only sound in law but also consonant with reason and justice.

WE DRAW ATTENTION TO THE TWO CASES OF *Ali Mahomed v. The Emperor* and *Sri Bhagwan Singh v. The Emperor* reported respectively at pp. 418 and 507 of the current volume of this journal in both of which the ruling in the case of *Nanda Kumar Sircar v. The Emperor*, 11 C. W. N. 1128, has been considered. In the former of the two cases their Lordships Holmwood and Sharfuddin, JJ., felt bound by the ruling in the case of *Nanda Kumar Sircar v. The Emperor*, 11 C. W. N. 1128. Their Lordships were of opinion that the view of Mitra and Fletcher, JJ., in *Nanda Kumar Sircar's* case, as to the misjoinder of charges was correct. Their Lordships observed at p. 418: "We feel ourselves bound by the rulings of this Court in the case of *Nanda Kumar Sircar v. The Emperor* which was passed after the Privy Council ruling in *Subramania Iyer v. The King-Emperor*."

THIS SEEMS TO INDICATE THAT, IN THEIR LORDSHIPS' opinion the ruling in *Nanda Kumar Sircar v. The King-Emperor* was in accordance with the Privy Council ruling in *Subramania Iyer's* case. But in the case of *Sri Bhagwan Singh v. The Emperor* which came up before their Lordships Holmwood and Ryves, JJ., their Lordships doubted the correctness of the ruling in *Nanda Kumar Sircar's* case. Their Lordships observed at p. 508 of the report: "But there is one passage in the judgment which we confess we do not quite understand, which does not appear to have formed part of the *ratio decidendi* in that case." Then their Lordships quoted the following passage: "The learned vakil who has appeared in

support of the conviction has relied on sec. 234 of the Code as supporting the procedure adopted by the Magistrate, but that section evidently refers to different acts done by the same individuals or same sets of individuals as against the same complainant or complainants so connected with each other that they may in law be taken to be one person," and then observed, "Now, this appears to be contrary to the previous ruling of this Court which we have referred to, and the case in 9 Calcutta was not before the Bench when they made this remark."

THE CASE IN 9 CALCUTTA IS EVIDENTLY THE case of *Manu Miya v. The Embress*, I. L. R. 9 Cal. 371, as to which another Criminal Bench of which Holmwood, J., was the senior Judge, observed in the case of *Ali Mahomed v. The Emperor* that the ruling in that case has been to all intents and purposes set aside by the judgment of the Privy Council in *Subramania Iyer's* case. In this conflict of views the question arises whether the ruling in *Manu Miya's* case is still good law. It may no doubt be questioned whether the Privy Council decision does in any way affect *Manu Miya's* case. In the Privy Council case it was held that where more than 3 offences of the same kind committed within a period exceeding one year, were tried together, the trial was illegal. It may be said that from this it does not necessarily follow that offences of the same kind not exceeding three committed within the space of 12 months against different persons may not be tried together. It may be argued therefore that the observation of their Lordships Mitra and Fletcher, JJ., in *Nanda Kumar Sircar's* case as to the joinder of charges under sec. 234, Cr. P. C., is not strictly warranted by the language of the section.

BUT IT SHOULD BE REMEMBERED THAT THE SECTION is an enabling section under which an accused person may be tried at one trial for 3 offences of the same kind committed within the space of 12 months. But when such a trial is likely to prejudice the accused, it is incumbent on the Court not to proceed under sec. 234, Cr. P. C., and to hold separate trials for the different offences. When in appeal or in revision it becomes apparent that a joinder of several offences under sec. 234 prejudiced the accused or even when the Appellate or the Revisional Court has reasons to think that the joinder might have prejudiced the accused, the conviction ought to be set aside. In this view the decision in *Nanda Kumar Sircar's* case seems to be reasonable. When several persons are arraigned before a Court for committing several offences of the same kind against different individuals, and tried together and convicted, it is difficult to say that this mode of trial involves no element of prejudice to the accused. Anyhow it is desirable that the conflict referred to above should be removed.

## CRIMINAL CASES OF 1908.

(Continued from p. clxxxvi).

**GENERAL REPUTE.**—[*Class of witnesses*]. Persons in the neighbourhood of the place of residence of the accused are the best witnesses (*Rai Ishi v. Emperor*, 23 Cal. 621; *Kekaboi v. Queen-Empress*, 27 Cal. 993, 995). When he is a well-known resident his fellow-citizens, though not living in his immediate neighbourhood, are competent witnesses (*Wahid v. Emperor*, 11 C. W. N. 789). But evidence of witnesses from villages distant from his place of residence, as to his character in connection with dacoities there committed, are admissible to prove his reputation in that locality (*Chintamon v. Emperor*, 35 Cal. 243).

[*Extent of admissibility of*]. Evidence of general repute is not admissible in cases under sec. 107 (*Emperor v. Bidhyabati*, 25 All. 273), or under cl. (f) of sec. 110 (*Akhoy v. Queen-Empress*, 5 C. W. N. 549; *Rahni v. Emperor*, 29 Cal. 779; *Wahid v. Emperor*, 11 C. W. N. 789). In the latter case proof of specific acts showing that the accused is, to the knowledge of the witness, a dangerous or desperate character is necessary (*Kalai v. Emperor*, supra).

[*Association*]. Mere association with men of bad character is not sufficient, unless it is to commit theft or dacoity (*Nilkamal v. Emperor*, 6 C. L. J. 711), and association must be with proved and not rebutted bad characters (*Emperor v. Nebal*, 13 C. W. N. 318). Evidence of association, at various times, and especially in most cases shortly before and near the place of dacoity, with bad characters, who were always suspected of being concerned in dacoities and many of whom were during the period of association bound down under sec. 110 or convicted of theft or dacoities, is sufficient. (*Chintamon v. Emperor*, 35 Cal. 243). Evidence of recent association is more cogent and relevant (*Emperor v. Nebal*, supra). There was some evidence of association, several years back, in *Chintamon v. Emperor*, supra.

**SURETY, FITNESS OF.**—The test of a surety's fitness is not his ability to supervise the person bound down but his sufficiency of means (*Adam v. Emperor*, 35 Cal. 400: see also *Abinash v. Empress*, 4 C. W. N. 797; and *Ram v. King-Emperor*, 6 C. W. N. 593), and his place of residence need not be close to that of the obligee (4 C. W. N. 797 and 6 C. W. N. 593; *Fhoja v. Queen-Empress*, 24 Cal. 155; *Re Suresh*, 3 C. L. J. 575). In *Poshi v. King-Emperor*, 12 C. W. N. xcix, the High Court ordered the Magistrate to accept the sureties, who were men of means, though the Magistrate was trying to get persons likely to control the accused. The Allahabad Court adopted the principle of ability to control (*Queen-Empress v. Rahim*, 20 All. 206; *Emperor v. Nabba*, 24 All. 471). And a Bench of the Calcutta High

Court has gone back on the previous ruling to some extent and held that pecuniary fitness is not the leading test. (*Falil v. Emperor*, 13 C. W. N. 80). Geidt, J., considered moral fitness as prevailing over property qualification, whereas Woodroffe, J., was of opinion that no particular kind of fitness was required, and that it had to be determined in each case whether the order was reasonable or not.

E. H. MONNIER.

(To be continued.)

## Review.

**THE LAWS OF ENGLAND.** Being a complete statement of the whole law of England. *By the Right Honourable the Earl of Halsbury, Lord High Chancellor of Great Britain, 1885-86, 1886-92 and 1895-1905, and other lawyers. Volume VI. London: Butterworth & Co., 11 and 12 Bell Yard, Temple Bar. Law Publishers. 1909.*

The present volume appears before Vol. V, which is to deal with the law of Companies and has been kept back to enable the editors to embody in it the provisions of the recently enacted Companies (Consolidation) Act. The volume under notice deals with the following titles: Compulsory purchase of land and Compensation, Conflict of Laws, and the first part of Constitutional Law. There are numerous English statutes giving powers to different public bodies to acquire land under varying special conditions. These are brought together and arranged and the principles relating to the assessment of compensation as indicated in these statutes and elucidated in reported cases are worked out with a degree of lucidity and precision which make it possible for the ordinary reader to understand them. The English statutory provisions relating to acquisition of land are very much more complicated than the provisions of the Indian Land Acquisition Acts, but they also bear evidence of greater regard for the rights of individual owners whose lands may be compulsorily acquired and provide for surer safeguards against the abuse of the power of acquisition. A comparison of the provisions of the English Statutes as summarised here with the Indian Statutes forces one to the conviction that the simplicity of the latter has in a great measure been attained at the sacrifice of the rights of private individuals. We recollect a recent instance of an acquisition by Government of land in the town of Calcutta which caused general dissatisfaction. Instances are not rare of similar acquisitions in the Mofussil which, though they do not form the subject of public comment, cause no little dissatisfaction to the parties concerned. The time, therefore, may not be far off when the public should move for the revision of Indian Acts on the lines of the English Statutes.

To Sir Thomas Raleigh, formerly law member for India, we owe a very useful, and so far as it goes, a fairly complete abstract of the case law on the subject of the Conflict of Laws. That the treatment of this title is also fully up-to-date will appear from the fact that the recently decided case of *Chetti v. Chetti* (13 C. W. N. xlv) upon which we commented at length in these columns, is referred to in several places in the foot-notes: The title, Constitutional Law, is only partially dealt with in this volume, the subjects "The Crown and the Executive" and "The Hereditary and Private Revenues of the Crown" still remaining for treatment in the next volume. The people of this country have little direct concern with the Crown, but this fact ought not to obscure from the views of the students of Constitutional Law what a potent factor the Crown is in relation to the British Parliament and the Privy Council, and through them both, to the Government of India. Under the last title will be found a clear and fairly concise treatment of the subjects, "The Title to the Crown," "Relations between the Crown and Subject," "The Royal Family" and "The Royal Prerogative." At the rate at which the work is progressing and considering the high level of merit maintained by the contributions which up till now have appeared we should be justified in looking forward to the early completion of what may fairly lay claim to be the most important legal publication of recent times.

## Notes of Cases.

### CALCUTTA HIGH COURT.

#### Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before CASPERSZ and RYVES, JJ. CRIMINAL REVISION No. 266 of 1909. MAKHAN GHOSH, Petitioner v. THE EMPEROR, Opposite Party. 5th May 1909.

*Penal Code, secs. 147, 148, and 224—Offences charged under secs. 147 and 148.—Conviction under sec. 224—Illegality of.*

The Petitioner and some others were convicted of rioting with the common object of assaulting two police constables engaged in the discharge of their duty. The prosecution case was that the constables had arrested the Petitioner and another person on a warrant and that they were rescued by some other, *goalas*. The trying Magistrate framed charges against the Petitioner under secs. 147 and 148, I. P. C., and found him guilty on the charges, and sentenced him to 3 months' rigorous imprisonment on each of the charges, the sentences to run concurrently. On appeal the Sessions Judge refused to believe the prosecution story in

its entirety and held that the charges under secs. 174 and 148, I. P. C., were not proved against the Petitioner. But he went on to observe in his judgment, "there is no reason however to doubt that Makhan Ghosh was in fact arrested under the warrant and by his own efforts and the possible assistance of others succeeded in escaping from custody in which he was lawfully detained for an offence. He is therefore guilty of an offence under sec. 224, I. P. C." He acquitted and discharged the other Appellants but sentenced the Petitioner to 3 months' rigorous imprisonment under sec. 224, I. P. C.

Their Lordships observed:—

"We have been referred to several authorities on the construction of secs. 236, 237 and 238, Cr. P. C., but it is sufficient to say, for the purposes of this Rule, that the Petitioner having been acquitted in respect of the object specified in the charges, and the remaining accused, also, having been acquitted altogether on those charges, it is impossible to sustain the conviction of the offence under sec. 224, I. P. C., substituted by the Appellate Court.

*Babu Upendra Narayan Bagchi* for the Petitioner.

*Rule made absolute and the Petitioner acquitted and discharged.*

CIVIL APPELLATE JURISDICTION. Before COXE and RICHARDSON, JJ. APPEAL FROM APPELLATE DECREE No. 978 of 1908. JADU SINGH AND OTHERS, Appellants v. BUTAN SINGH AND OTHERS, Respondents. 19th May 1909.

*Talabi mowasibat, performed, but not declared to have been performed—Talabi istishad.*

The appeal arose out of a suit for pre-emption. The Plaintiffs performed the *talabi mowasibat* in the presence of witnesses. They took the witnesses to the vendor and there performed the *talabi istishad*. The Munsif gave them a partial decree, but on appeal the Subordinate Judge held that the performance of the *talabi istishad* was not in accordance with the strict provisions of the Mahomedan law, and accordingly decreed the appeal and dismissed the suit. The defect which the Subordinate Judge found in the performance of the *talabi istishad* was thus described by him. "While performing the *talabi istishad* the Plaintiff was bound to declare that he had observed the *talabi mowasibat* and then invoked the witnesses. But he did not say that he made the declaration that he had observed the *talabi mowasibat*."

*Held*—That the omission of any mention of the performance of the *talabi mowasibat* at the time of the performance of the *talabi istishad* was fatal.

*Rajab Ali Chopedar v Chandi Churn* (I. L. R. 17 Cal. 543) followed.

*Moulvi Mahammad Mustaffa Khan* for the Appellants.

*Moulvi Syed Shamsul Huq* for the Respondents.  
A. T. M. *Appeal dismissed.*

# THE Calcutta Weekly Notes.

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[No. 30]

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## REPORTS (See Index.)

WE HAVE GRAVE DOUBTS AS TO WHETHER THE rule of practice which is sought to be laid down in the case of *Bhuyan Abdus Sobhan Khan* reported at p. 753 of this number will, if generally adopted, either tend to the convenience of the parties concerned or relieve the congestion of business on the Criminal Revisional side of the High Court. In the class of cases to which it belongs, the Sessions Judge, to whom the applicants are now directed to make their applications for revision in the first instance, can admittedly grant no relief and the only order that he can pass is either to refer the matter to the High Court or to refuse to refer it. In either case the applicant will have to come to the High Court to make out his case for its interference, and the only appreciable effect, to him, of this circuitous procedure will be delay and further expense.

WE ALSO FIND OURSELVES UNABLE TO AGREE, after the most careful perusal of the report of the case of *Queen-Empress v. Reolah*, I. L. R. 14 Cal. 887, that any such rule was laid down in that case. That case was no doubt one in which an application could have been but was not made to the Sessions Judge for reference to the High Court under sec. 438 of the Criminal Procedure Code. But the Judges (Prinsep and Pigot, JJ.) did not

refuse to entertain the application. They said they would hear the application and then they proceeded to lay down what course applicants should pursue when the Sessions Court and the High Court have concurrent jurisdiction to deal with the case, and they added this important proviso, "but in cases in which concurrent jurisdiction is not possessed by the lower Courts, no such general rule exists."

IT WILL BE SEEN FROM THE TERMS OF SEC. 435 of the Criminal Procedure Code that if by "concurrent jurisdiction" in the above extract was meant not merely jurisdiction to deal finally with the application but also the jurisdiction to refer to the High Court, then the revisional jurisdiction of the Sessions Judge and the High Court would really be co-extensive, and the proviso which the Judges were so careful to add would be meaningless. We rather think that the case of *Queen-Empress v. Reolah* is an authority for the view that applications like the one made on behalf of *Bhuyan Abdus Sobhan Khan* can be made to the High Court direct.

WHAT THE LEARNED JUDGES INTENDED TO LAY down in the case in I. L. R. 14 Cal. 887 is apparently this, that where as for instance in cases coming under sec. 436 or sec. 437 of the Code, the Sessions Judge or the District Magistrate can deal finally with the matter, no application for revision made to the High Court will be entertained unless the applicant has tried the chance, which the law gives him, of getting whatever relief he may ask for from the lower Courts, and failed. The real object of giving Sessions Judges and District Magistrates the power to refer cases to the High Court seems to be to give poor persons, who cannot afford to move the High Court direct by counsel or pleader, a chance of placing their grievances before the High Court through these officers, with power to these officers to refuse to make their recommendations to the High Court if the case does not appear to them to be a fit one for interference. We also think that if ever it should be found desirable to introduce a rule of practice as comprehensive in its scope as the one under consideration, in order to avoid confusion, this should be done under the rule-making power of the High Court.



THE CHIEF JUSTICE DELIVERED JUDGMENT IN what is known as the Midnapur Bomb Case Appeal on the 1st of June last. Few cases within recent times have created a greater stir in these Provinces than the Midnapur Bomb case. The facts of the case as sifted and laid bare in the judgment of the High Court deserve the most careful study on the part of the public as also of those in authority. They are set out in language which throughout is severely judicial. Those who attended the hearing of the appeal were struck as much by facts brought out in argument, directly bearing on the case, as by the side-light thrown into various other matters bearing more or less on the methods of the prosecution. The judgment is silent as to all these matters except in so far as they tend to throw light on the case for and against the accused. It is to be hoped that all these matters will be thoroughly sifted at the enquiry which the Government intends to hold in connection with this case. "The difficulty," as their Lordships truly say, was "not in appreciating the relevant evidence but in determining what evidence is relevant." Therefore although many matters not directly bearing on the case were made the subject of comment at the hearing, not all of them are touched in the judgment.

BUT EVEN THE "RELEVANT" FACTS BROUGHT out by the judgment make up a story of which it is difficult to find a parallel in the judicial records of British India. These facts are now public property and it is unnecessary to repeat them. The opening paragraph of the judgment outlines the nature of the case which was sought to be set up at the beginning of the trial. It was that "there was a conspiracy by a secret society working at various places at Midnapur and elsewhere, and having as one of its objects the assassination of the District Magistrate of Midnapur by bombs, explosives, and fire-arms. Twenty three places of meetings are enumerated and some idea of the suggested extent of the conspiracy may be gathered from the fact that no less than 154 persons are named as implicated drawn from all classes of society, from Raja to beggar." Then their Lordships go on to say:—

Proceedings before the Committing Magistrate were taken against 27 of these persons, but before the case had proceeded far the Advocate-General, Mr. Sinha, on 9th of November withdrew from the prosecution of 24 of the accused persons who were thereupon discharged. Though it may have appeared at the time that the Advocate-General was taking upon himself a serious responsibility events have amply justified his action and there can be no doubt that the course he took was right from every point of view. Thereafter the proceedings were continued against the three Appellants above.

THE CASE OF CONSPIRACY AGAINST THESE PERSONS practically rested on the confessions of two out of

the three accused. The narrative of facts leading up to the confession of Santosh who was further charged with having been in possession of the bomb alleged to have been found in the house of his father on the 8th of July 1908, is one of absorbing interest, but we content ourselves with reproducing only the following summary.

After his arrest we find Santosh visited once by his mother and repeatedly by his father and brother. Though the prosecution would have it that no Police visit to Santosh between the 12th and 29th July is shown and the absence of a proper jail record makes it impossible to meet this argument by direct proof to the contrary, the confession itself shows that those in possession of Exhibit 7 must have had access to Santosh and there can be no doubt that the desirability of a confession was being continually pressed on him as a means of saving his relations from the risk of being apprehended and even threatened pains and penalties and possibly of securing advantage to himself. There was the arrest of his father, for which he must have regarded his persistent silence as responsible. Then there is the confession itself, recorded without the precautions prescribed by the Code, and made in the presence of Mr. Weston, who was practically, as he himself says, the head of the Police and was interested in the case not merely officially but personally too, for he believed that the plot was directed against his own life. How can the part Mr. Weston took in the amplification of the confession be left out of account? Finally we have the petition for retraction on the 31st August, the reluctance and delay in giving effect to the petition, and the retraction itself.

AS REGARDS THE NATURE OF THE AMPLIFICATION of the confession in which Mr. Weston is found to have taken part, the finding is as follows:—

Not only was the confession recorded in Mr. Weston's presence but we find him actively interfering by putting and suggesting questions on the strength of documents and information with which he had been previously furnished. What precisely these documents contained we do not know for they are not forthcoming. The Advocate-General's attention was invited to these questions, and though no one could have been more strenuous than he in defence of those engaged in the investigation of this case he had to concede that there was hardly a question which had not an incriminating tendency and in his view an "objectionable practice" had been pursued. In this he certainly did not err in overstatement.

After this it is no wonder that their Lordships hold that in obtaining the confession "there was no compliance either with the letter or the spirit of the law."

REGARDING THE STORY AS TOLD IN THE CONFESSION, their Lordships observe:

Santosh's version of what happened on the 7th July is in substantial though not complete agreement with what is recorded in exhibit 56. But the story told is of such an extraordinary character that it is difficult to persuade oneself of its possibility. It is the Raja of Narajole that set things in motion, and without him the bomb would have passed that day unnoticed. But we are asked to believe that this gentleman's curiosity got so much the better of his discretion that though the town was full of police, imperturbed by reason of the suspected conspiracy, it became necessary to have the bomb brought to Jamini Mullick's house for his

inspection. Why he should have wanted to see it we are left to guess as best as we can, nor is it apparent why the Raja's agreement should have been sought to bombs being used by Surendra Nath Mukerjee on the Magistrate. But still this is the story we are asked to believe.

THIS WAS ALSO THE IMPRESSION WHICH THE story left on the minds of all who heard it when it was first propounded at the enquiry before the committing Magistrate. Nevertheless there was still the bomb discovered in the *baitakhana* of Santosh's father's house and the case as against the three accused was proceeded with. As to the discovery of the bomb their Lordships observe as follows :—

It is difficult to see what could have been Santosh's object in placing the bomb in the "*baitakhana*," seeing the grave risk to himself, to his family, and to his father's house that was involved, for it has not been suggested that he did it to shift suspicion from himself to his father, or the other members of his family. Moreover the case for the prosecution is that this bomb before finding a resting place in Peary's "*baitakhana*" was carried about from meeting to meeting where it formed the subject of discussion; but it has to be remembered that at this time Midnapore was full of Police drafted into the town on account of the suspected conspiracy. The defence stoutly maintain that the bomb was placed there by or at the instigation of the Police, and they have called direct evidence that Banomali was employed for this purpose. Though this evidence does not enable us to pronounce a positive opinion in favour of the defence story, we are by no means prepared to waive it aside as absolutely worthless, especially in view of the methods that have been exposed in the course of the hearing before us.

THE CONCLUSIONS TO WHICH ONE IS IRRESISTIBLY led by a consideration of the facts disclosed in the judgment are *first*, that the conspiracy in which persons drawn from all classes of society "from Raja to beggar" took part was a myth; *secondly*, that the three Appellants were innocent and had been convicted upon the basis of confessions which had been elicited by grossly improper means; and *thirdly*, that the methods adopted in getting up the prosecution were such as to call for a searching inquiry into the conduct of all persons concerned in it.

NOT THE LEAST REGRETTABLE CIRCUMSTANCE IN connection with this case was the treatment received by the counsel and the pleaders for the defence. In the words of their Lordships "the Moulvie (Deputy Superintendent of Police) while in the witness box was allowed to make unfounded imputations against counsel for the defence." "Impropriety of this kind on the part of the witness," their Lordships add, "should have been firmly checked by the Court." Then the prosecution charged counsel for the defence with having "smuggled into the records" the petitions of retraction made by the accused and this charge was repeated at the hearing of the appeal by Mr. Gregory, the

Officiating Advocate-General, who had conducted the case on behalf of the Crown in the Court of Sessions also. Their Lordships found the imputation to be unsupported by any evidence and without foundation. On this part of the case their Lordships observe :—

But the Advocate-General has disclaimed any intention of making any imputation against the members of the Bar, and apparently he so disclaimed because they were members of the Bar. But he did not relinquish his argument and he merely shifted the imputation to Peary Lal Ghosh, a member of the pleaders' bar, in whose favour he considered the same grounds of disclaimer did not exist. . . . This charge . . . against Peary Lal Ghosh was made without a little of evidence to support it, and we regret that the Advocate-General should have seen fit to persist in it even after this absence of evidence was brought to his notice; it was no answer at this stage to rely on instructions.

BY A NOTIFICATION DATED THE 1ST JUNE 1909 and published in the *Calcutta Gazette* of the 2nd June 1909, the notification of the High Court dated the 16th April 1909 (reproduced at p. clxviii (168) of the current volume) has been cancelled. The amendment of the Rule for the admission of attorneys of this Court to practise as vakils, hereby cancelled, would have enabled all attorneys of three years' standing to apply for enrolment as vakils as a matter of course. There was, not unnaturally, strong opposition to this amendment on the part of the Vakil Bar and the Vakils' Association had, we understand, addressed the Chief Justice and the Judges for a reconsideration of the amendment. It is believed that the original application of the attorneys on the subject is still under the consideration of the Judges.

## CRIMINAL CASES OF 1908.

(Continued from p. cxv.)

REFERENCE TO SUPERIOR COURT.—[*Powers*]. Sec. 123 (3) contemplates a decision on the merits, and not a consideration of the sufficiency of the security (*Gagan v. Emperor*, 12 C. W. N. 463). [*Imprisonment in default*]. It has been held in *Emperor v. Tula*, 30 All. 334, that a person detained in custody under sec. 123 is undergoing a sentence of imprisonment. This view was partly followed in *Emperor v. Nepal*, 13 C. W. N. 318, but it is opposed to *Emperor v. Muthukomaran*, 27 Mad. 525, *Re Venkatgadu*, 2 Weir 452 and *Kannigan v. Emperor*, 13 Mad. 515, which dissented from it.

PUBLIC NUISANCE.—[*Order without procedure of sec. 133*]. An order without a formal proceeding under sec. 133 and without evidence is bad (*Samsul v. Sheikh*, 12 C. W. N. ccxxiii), and cannot be passed merely on conviction under sec. 341, I. P. C. (*Mohini v. Harendra*, 31 Cal 691 (E. B.), overruling, 5 C. W. N. 432).

[*Bona fide claim of title*]. Where a party raises a claim of title to land, the Magistrate must come to a proper finding as to the question of the *bona fides* of the claim, and cannot decide whether it is barred (*Kamini v. Emperor*, 35 Cal. 283). This subject is dealt with exhaustively in the Author's Article "*Criminal Cases of 1907*" under the above heading.\* If a person, instead of raising the plea of title, applies for a jury, they are competent to decide the question of public or private way and the party is bound by their verdict (*Emperor v. Ram*, 30 All. 364, 366). The case did not determine the function of the jury when such plea was taken, but it is obvious that it then becomes a matter that goes to the root of the Magistrate's jurisdiction to take any proceeding at all under the section, and cannot be put to the jury (3 C. W. N. 245: 26 Cal. 869, 870: 4 C. W. N. 596: 31 Cal. 979: 3 C. L. J. 360: 10 C. W. N. 845).

[*Removal of nuisance*]. The Magistrate can only direct a party to "*remove the nuisance*" i.e., cause the nuisance to cease, and not to remove the burning ghat (*Indra v. Queen-Emress*, 25 Cal. 425), nor to prohibit the use of grave yard (*Sheo v. Lal*, 12 C. W. N. 70). [*Fencing well*]. The Magistrate can only direct the construction of such works as will ensure the safety of the public and not of the road (*Aluvala v. Emperor*, 31 Mad. 280).

[*Appointment of jury*]. The Magistrate should, on the failure of the jury to meet and give a verdict, appoint a fresh jury and not proceed to pass an order under sec. 141 (*Shib Chandra v. Hriday*, 12 C. W. N. 1047), but he is competent to act under that section when a minority of the jury has refused to act. (*Durga v. Sashi*, 13 Cal. 275, 279.)

[*Notice*]. Where the conditional order is not complied with and not protested against, a prosecution is sustainable for its disobedience without notice under sec. 140 (*Aluvala v. Emperor*, 31 Mad. 280: see also *Queen-Emress v. Narayana*, 12 Mad. 475: *Queen-Emress v. Bishambar*, 13 All. 577).

URGENT NUISANCE.—A Magistrate has no jurisdiction under sec. 144 to direct a removal into Court of the disputed property for two months, or till the decision of the Civil Court (*Leong v. Tchin*, 12 C. W. N. 1024).

LAND DISPUTES.—[Secs. 107 and 145]. Where the dispute relates to a fishery the proceeding under sec. 145 and not sec. 107 should be adopted. The words in sec. 145 are mandatory, while those of sec. 107 discretionary (*Balajit v. Bhoju*, 35 Cal. 117). This view is in accord with 35 Cal. 559: 6 C. W. N. 883: 7 C. W. N. 29, 142: 1 C. L. J. 632: 25 All. 531, 540, 541: see 24 W. R. Cr. 67 and *Emperor v. Ram Baran*, 28 All. 406, 407, but in some other cases it has been held that the

Magistrate has jurisdiction to proceed either under sec. 107 or secs. 144, 145 (7 C. W. N. 746: 9 C. W. N. 551: 32 Cal. 966: 26 Mad. 47: *Weir* 722: and see 23 W. R. Cr. 58: 7 Mad. 460), though ordinarily the mere appropriate course is that provided in sec. 145 (9 C. W. N. 551: 23 W. R. Cr. 58, and see 6 W. R. Cr. 4: 25 All. 537, 539). The case of *Baisnab v. Emperor*, 12 C. W. N. 606, holds that it is unfair to bind down one party under sec. 107, but either that both should be bound down under sec. 107 or proceedings under sec. 145 should be taken.

[*Order as to moveables*]. An order to attach reaped crops, and keep the same in police custody till the right of the parties to them have been determined by the Civil Court is without jurisdiction (*Ram v. Kailash*, 8 C. L. J. 242). See also as to harvested crops (30 Cal. 110, 111: 9 C. W. N. cxxv: 28 All. 266, 267: 11 C. W. N. cxxxix) plucked fruits (*Arju v. Arman*, 7 C. L. J. 369), and as to other moveables (11 C. W. N. cclxii).

[Secs. 145, 147]. A dispute as to possession of land and water with trees, crops, etc., is one under sec. 145. A dispute not as to possession of the land and water itself but as to a right of use of land or water falls within sec. 147. A claim to a right, as incidental to and arising out of possession of the subject of dispute is a claim to possession within the former section, but a mere claim of right not founded on possession of the subject-matter itself is under the latter. Hence an order declaring the possession of land and minerals of a party and not his merely mineral rights is *intra vires* under sec. 145 (*Jaganath v. Ondal*, 12 C. W. N. 840, 842). So a decision as to the possession of a hill itself, and not merely a right of quarry comes under sec. 145 (11 C. W. N. 365, 371: see 23 W. R. Cr. 45). So also a dispute as to a ferry is within sec. 145, when it involves a question as to possession of land and water on either side of the stream (26 Cal. 188: 9 C. W. N. ccxv), and under sec. 147 when only the question of right to ferry is in issue (3 C. W. N. 148). A dispute as to right to fish as incidental to possession of the water under sec. 145 (13 Cal. 179, 181: 12 Cal. 539, 541: 23 Cal. 557, 560: see *Balajit v. Bhoju*, 35 Cal. 117), but a dispute as to a right to fish independently of possession of the water falls under sec. 147 (23 Cal. 55: 23 Cal. 557: see 11 Cal. 413, 416). So if the trees on land and the land itself are claimed to be in possession, sec. 145 applies, but if only the fruit is claimed, sec. 147 is applicable (11 C. W. N. 108, 201). Sec. 145 obtains where there is a dispute as to the right to collect toll or dues from a market based on possession of the whole or a partitioned part of it (*Re Nathu* 24 All. 315: *Dunne v. Kumar*, 30 Cal. 593, 597), but not a matter relating to the distribution of fees by pilgrims which does not involve possession of land (*Misser v. Bhugwan*, 3 C. L. J. 137). A dispute as

to crops themselves comes within sec. 145, but not when there is no dispute as to actual possession of either the land or the crops but only to a certain share of crops under an agreement (*H. C. Pro. 13 July 1868*, 4 Mad. H. C. R. Ap. xii). A dispute between rival zemindars as to the right to collect rents of land, the exclusive possession of which is claimed by both, is within sec. 145 (*11 Cal. 413*; *15 Cal. 527*; *16 Cal. 573*; *12 Mad. 88*; *23 Cal. 80*, *84*; *27 Cal. 892*, *902*, *903*, *914*; see 5 W. R. Cr. 14 per Glover, J.), but not a dispute as to a right to realize rent in respect not of the whole 16 as. but of an undivided share (*23 Cal. 80*; *18 W. R. Cr. 36*; *25 W. R. Cr. 2*; 5 All. 607; see 7 C. W. N. 462). A dispute between co-owners as to separate and permissive possession of joint property is not within the section (*Kamini v. Haripada*, 12 C. W. N. cxcix; see also *L. C. W. N. 512*). With respect to the latter class of cases, a managing member of a joint Hindu family under the Mitakshara law has possession independent of the consent of the other members and can be maintained in possession (*Bhaskari v. Bhaskaram*, 31 Mad. 318; *Sri Mohan v. Narsing*, 27 Cal. 259, 261n).

E. H. MONNIER.

(To be continued.)

### CURRENT INDIAN CASES.

AIYAKANNA v. EMPEROR, I. L. R. 32 Mad. 49. C. Cr. P., sec. 476.

An action may be taken under sec. 476, C. Cr. P., in the course of the judicial proceeding in the course of which the offence is committed, or at the conclusion of the judicial proceeding or so soon after as to make it the continuation of the same proceeding.

VENCATACHELLA v. SAMPATHA, I. L. R. 32 Mad. 62. Income Tax Act, secs. 14, 26—Evidence Act, sec. 124.

Once it appears that a communication to a person was made in official confidence, it is left to him and not to the Courts to decide whether public interests would suffer by the disclosure, and the Courts have no power to compel production if he considers such production prejudicial to public interests; but it is a pre-requisite that the communication must have been made to him in "official confidence."

The orders of the Collector under sec. 14 or sec. 26 of the Income Tax Act determining the amount of the income tax payable are not privileged documents under sec. 124 of the Indian Evidence Act.

THE OFFICIAL ASSIGNEE OF MADRAS v. G. SMITH, I. L. R. 32 Mad. 68. Banker & customer—Fiduciary relationship.

No fiduciary relationship exists ordinarily be-

tween a banker and a customer; it is that of a creditor and a debtor.

GOVINDOSAMI v. RAMASWAMY, I. L. R. 32 Mad. 72. Limitation Act, Sch. II, Art. 91.

"We can see no reason why, when the sale is voidable for fraud, Art. 91 of the Limitation Act should not be applied. If the sale is not avoided it stands good and the title passes by it."

### Notes of Cases.

#### ENGLISH LAW COURTS.

##### PRIVY COUNCIL.

[ON APPEAL FROM ALLAHABAD.]

LORD MACNAGHTEN.  
LORD ATKINSON.  
LORD COLLINS.  
SIR ANDREW SCOBLE.

1909.  
11, May.

In re CHAUDHRI NAUNIHAL SINGH,  
MUSAMMAT PARBATI,  
Appellant,

v.  
CHAUDHRI NAUNIHAL SINGH, Respondent.

Privy Council—Appeal heard ex parte—Application by Respondent for rehearing before judgment delivered—Good cause.

This was an application on behalf of the Respondent to restore the above appeal (which was heard *ex parte* in March last) to the list for rehearing. The appeal to His Majesty in Council was admitted by the High Court on the 22nd July 1905. The record of the case was received at the Privy Council office on the 13th February 1907. It was set down for hearing *ex parte* on the 22nd January 1909. The Petitioner instructed his agent in London by cable on the 30th April 1909, to appear on his behalf. He prayed for re-hearing or for time to file another petition for re-hearing on receipt of full instructions from India.

Mr. Bhugwandin Dube appeared for the Petitioner.

Mr. G. E. A. Ross for the opposite party.

Mr. Dube after stating the facts of the case read out the cable received by the solicitor in London which was:—"Naunihal Singh severely ill several months, want of notice, famine, grounds delay affidavits follow," as ground for restoring the appeal to the list.

LORD MACNAGHTEN.—I do not think there is any ground whatever.

Mr. Dube.—Then I pray for time.

LORD MACNAGHTEN.—Why?

Mr. Dube.—The "want of notice" might be a sufficient ground. I am not sure whether the client had notice of the appeal or not. If your Lordships would postpone the delivery of the judgment for some time a second application with fuller details would be made on receipt of instructions by post.

**LORD ATKINSON.**—The application for appeal was made in India on the 22nd July, 1905, and he had notice that that application was acceded to and of the despatch of the record to England. Then the record arrived here on the 13th February 1907.

**Mr. Dube.**—Yes, that appears from the record. But in a similar case in *Bahadur Singh v. Mohar Singh*, I. L. R. 24 All. (P. C.) 94 at 101, your Lordships granted the application for re-hearing.

**LORD MACNAGHTEN.**—Each case must be judged on its own merits. I do not think that there are any merits here at all.

**Mr. Dube.**—There might be force in the plea of "want of notice."

**LORD MACNAGHTEN.**—"Notice of admission has been given to the Respondent." That is the certificate of the Registrar of the High Court.

**Mr. Dube.**—The Petitioner wires "want of notice." I am not in a position to admit before receiving further instruction that he actually received notice of the appeal.

**LORD ATKINSON.**—Also it appears that he received notice of certain revivor proceedings.

**Mr. Dube.**—If your Lordships would be pleased to give two weeks' time full instructions and affidavits will be available.

**LORD MACNAGHTEN.**—Has anything been received except the telegram?

**Mr. Dube.**—There is another telegram received recently which says "affidavits follow next week." The client seems to be spending a lot of money over cables. That shows that he is keen about it and would have appeared if he had known. There would be no harm done to the Appellant if your Lordships grant me time.

**LORD MACNAGHTEN.**—Mr. Ross, is there really anything in it at all? Can you tell us anything more than what we have heard already?

**Mr. Ross.**—No, nothing more.

**LORD ATKINSON.**—It is very odd that he never moved till after the argument.

**Mr. Ross.**—It may be that he was very confident that he would succeed and so did not think it necessary to appear. Perhaps his confidence was a little bit shaken by the argument. This is an extraordinary application. There are no grounds at all.

**LORD MACNAGHTEN.**—It is plain that he had notice.

After some deliberation their Lordships' order was delivered by

**LORD MACNAGHTEN.**—Their Lordships are unable to advise His Majesty to grant the petition or to delay the procedure.

*Ranken Ford, Ford and Chester*: Solicitors for the Petitioner.

*D. Grant*: Solicitor for the Opposite Party.

*Petition rejected with costs.*

\* Their Lordships' judgment was delivered by Lord Atkinson on May 13th, 1909 following the appeal with costs.

## CALCUTTA HIGH COURT.

### Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

**CRIMINAL REVISIONAL JURISDICTION.** Before **CASPERSZ** and **RYVES, JJ.** **CRIMINAL REVISION** No. 111 OF 1909. **TARAK NATH ROY CHOWDHURY AND OTHERS, Petitioners v. THE EMPEROR**, in the complaint of **RAM KUMAR SARKAR**, Opposite Party. 8th May 1909.

*Criminal Procedure Code, sec. 107—Proceedings whether should be continued after the proceeding under sec. 145 relating to the same matters has been disposed of.*

On the 4th of April 1908, one, Ram Kumar Sarkar, filed a complaint before the Magistrate alleging certain acts of oppression of the Petitioners in regard to the possession (which was disputed) of certain land. The Magistrate thereupon on the report of a certain officer, which was called for, instituted a proceeding under sec. 107, Cr. P. C., against the Petitioners. Subsequently the case was transferred to the file of a Deputy Magistrate, who however was of opinion that the proper proceeding in the case was under sec. 145, Cr. P. C., and not under sec. 107, Cr. P. C. He therefore stayed the proceeding under sec. 107, Cr. P. C., and directed the institution of a proceeding under sec. 145, Cr. P. C., and actually drew up a proceeding under sec. 145 between the parties on the 30th July 1908. In the meantime the aforesaid Ram Kumar Sarkar had moved the District Magistrate against the order of the Deputy Magistrate staying proceedings under sec. 107 and ordering the initiation of a proceeding under sec. 145, Cr. P. C., and the District Magistrate on the 31st July passed orders directing the stay of proceedings under sec. 145, Cr. P. C., and the institution of a fresh proceeding against the Petitioners under sec. 107, Cr. P. C. The Petitioners thereupon moved the High Court which set aside this order of the District Magistrate. Subsequently the District Magistrate passed the following order:—

"The proceedings under sec. 107, Cr. P. C., should be instituted as ordered by my predecessor. The High Court's order refers to the proceedings under sec. 145, Cr. P. C., and not those under sec. 107, Cr. P. C."

Against this order the Petitioners obtained this rule.

Their Lordships observed:—

"The Magistrate has now offered his explanation, and he says that the proceedings under sec. 145, Cr. P. C., were disposed of on the 15th March 1909, and that, in his opinion, it is not desirable to drop the proceedings under sec. 107. *Prima facie* the possession of the land having been awarded to the first party, and not to the Petitioners,

it would appear that there is no further likelihood of a breach of the peace. But the manager's report makes it appear that *lathials* and *barkun-~~ses~~* had been collected by the Petitioners for the purpose of overawing the refractory tenants. We do not, in the circumstances, desire to fetter the discretion of the Magistrate who is responsible for the peace of the District. But we certainly wish him to reconsider the position and decide as to whether, after the lapse of all this time, the same circumstances will necessitate additional action under sec. 107 of the Code. We do not therefore order the proceedings to be quashed but we allow them to be continued by the Magistrate and direct him to arrive at a fresh decision in the light of the observations we have made.

*Babu Tarak Chandra Chakravarty* for the Petitioners.

B. C.

• *Rule discharged.*

CIVIL APPELLATE JURISDICTION. Before CHITTY and VINCENT, JJ. APPEAL FROM APPELLATE DECREE NO. 1633 OF 1907. DEB NARAIN DUTT AND OTHERS, Appellants v. BAIDYA NATH NAPIT, Respondent. Heard, 30th April. Judgment, 10th May 1909.

*Recognition of tenant by landlord—Receipt of rent from agent—Horticultural land—Erection of building—Permanent lease—Adverse possession of limited interest.*

The Plaintiff sought to establish his title in and to obtain possession of an eight anna share in certain lands. The Plaintiff purchased the 8 anna maliki right on the land in 1268 B. S. The land in suit was then in the possession of one Kasinath and he executed a *kabuliyat* in favour of the Plaintiff in 1268. After the death of Kasinath, his nephew Jadu succeeded to his rights in that land and in 1296 he sold the land to the Defendant. The Plaintiff sued to eject the Defendant on the ground that Jadu had no transferable interest in the same and that the Defendant was a trespasser.

The Munsif awarded the Plaintiff a decree granting him joint possession with the Defendant but on appeal the decision was reversed and the suit dismissed. The Plaintiff then applied to the High Court.

Kasinath was a raiyat of the village and the land in suit was originally let to him for horticultural purposes.

*Held*—That the receipt of rent from a transferee not on his own account but as an agent of the transferor was not a recognition of the transfer.

15 W. R. 197 and 7 C. W. N. 132, followed.

*Naba Kumari v. Behari Lal*, (I. L. R. 34 Cal. 905) distinguished.

The question whether the Defendant was accepted as a tenant is not a question of fact but of law.

A limited interest in land may be acquired by adverse possession.

Where the land was let as garden land with special reservations regarding trees, ordinary provisions of Bengal Tenancy Act apply. The fact that the land was used as *basti* land for the last 40 years does not make it permanent.

*Grant v. Robinson*, (11 C. W. N. 242) distinguished.

*Babu Sib Chunder Palit* for the Appellants.

• *Babu Satis Chunder Mukerjee* for the Respondent.

A. T. M.

*Case remanded.*

CIVIL APPELLATE JURISDICTION. Before BRETT, J. APPEAL FROM APPELLATE DECREES NOS. 1660, 2157 OF 1907. AJUHANNESSA BIBI, wife of GOLAM RABBAIN CHOWDHURY, Defendant, Appellant v. HAKIM BISWAS AND OTHERS, Plaintiffs, Respondents. • 2nd March 1909.

*Bengal Tenancy Act (VIII of 1885, B. C.), sec. 29—Kabuliyat to pay rent at more than 50 per cent. above the original rate if legal—More than one holding consolidated into one.*

Plaintiff sued to recover rents for 1311 at the old rates of Rs. 43 odd and Rs. 28 odd, respectively for 32 bighas and odd and 21 bighas and odd lands and for a declaration of his right to an enhanced rate of rent from 1312 at the *kabuliyat* rates of Rs. 61 odd and Rs. 50 odd respectively. Both the Courts below were of opinion that the *kabuliyats* were genuine; but the first Court held that by the *kabuliyat* no new settlement had been made with Defendants, they were merely confirmatory of the old settlement; besides there was no consideration for executing these *kabuliyats* and for stipulation to pay rent at a considerably enhanced rate. Though the area slightly increased, in one case by less than a bigha, in another case by two bighas and odd, no new plot of land had come into existence and the very lands rented in the *kabuliyat* were tried to be assessed at the enhanced rate which had thus the effect of greatly increasing the rent, contrary to sec. 29, Bengal Tenancy Act. The first Court therefore dismissed the Plaintiff's suit. On appeal the Sub-Judge was of opinion that the *kabuliyat* did not contravene the provisions of sec. 29, as more than one holding were consolidated into one and Defendants bound themselves to pay rent at the so-called enhanced rate after measurement as upon a new contract, and that there was consideration and therefore the Plaintiff was entitled to recover rent at the *kabuliyat* rate.

On second appeal, held, that the mere consolidation of the three Jamas was no consideration and the fact that a small quantity of land within the boundaries of these holdings was on measurement found to be in the possession of the Defendants in each case in excess of the amount rented in the *kabuliyat* was not in itself

sufficient to establish that the contracts were not contracts in violation of the provisions of sec. 29 of Bengal Tenancy Act.

That the clause in the *kabuliyat*, that after measurement rent is to be paid at a certain rate has the effect of enhancing the previous rent very nearly to 50 p. c. Held—that this clause is clearly in violation of sec. 29, Bengal Tenancy Act.

*Babus Sarat Chandra Roy Chowdhury and Charu Chandra Bhattacharya* for the Appellant.

*Babu Manmocha Nath Mukerjee* for the Respondents.

C. B.

*Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before CHITTY and CARNDUFF, JJ. APPEAL FROM APPELLATE DECREE NO. 2187 OF 1907. BANKU BEHARY CHRISTIAN AND OTHERS, Appellants v. RAJ CHUNDER PAL AND OTHERS, Respondents. Heard, 12th and 13th May. Judgment, 24th May 1909.

*Law, question of, if can be raised in second appeal—Bengal Tenancy Act (VIII of 1885), sec. 85, cl. (2).—Tenancy—Proof apart from lease—Possession as proof of title against trespasser.*

The Plaintiffs sued for a declaration of their jamai right to certain land, and for possession thereof jointly with Defendant No. 11. Both the lower Courts gave the Plaintiffs a decree for two-thirds of the land in suit. The legal representative of Defendant No. 1, who died since the suit was filed, and Defendant No. 6 preferred the appeal. So far as the Appellants were concerned it was found that they never had any title to the land in dispute and that they were never in possession, until they dispossessed the Plaintiffs as complained of. The Plaintiffs claimed as sub-lessees of one Mohim, who held the land from the malik Nabin Chandra under a *kabuliyat* dated 3rd Srabun 1293 (1886). By a registered patta dated 12th Srabun 1301 (1894) Mohim sub-let to the Plaintiffs in perpetuity at a certain annual rent.

The only point that was urged was that the patta under the provisions of sec. 85, cl. (2) of the Bengal Tenancy Act, should never have been admitted to registration; that the registration was of no effect, that it was absolutely void; and that inasmuch as the Plaintiff's title rested upon it, and upon it alone, the Plaintiffs must be held to have failed to prove their title and their suit must be dismissed.

*Held*—A pure question of law might be urged for the first time in second appeal, though the fact that Defendants had not previously pressed it might be considered in awarding or refusing costs.

Assuming that the lease to the Plaintiffs was void in the sense that it could not lawfully be registered and must be treated as unregistered and

consequently incapable of affecting the property referred to in it or being admitted in evidence, the Plaintiffs were nevertheless entitled to a decree. The dispute was not between the Plaintiffs and their immediate lessor nor with the superior landlord. It was open to a tenant to prove his tenancy *aliunde*.

A Plaintiff in ejectment must prove his title, but here it was not necessary for the Plaintiffs to establish their Makarari lease, for their previous possession was a sufficient title against the Appellants.

*Pemraj Bhowaniram v. Narayan* (I. L. R. 6 Bom. 215), referred to.

*Babus Dwarka Nath Chuckerbutty and Tarack Chunder Chuckerbutty* for the Appellants.

*Dr. Rash Behary Ghosh and Babu Brojolal Chuckerbutty* for the Respondents.

A. T. M.

*Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before RICHARDSON and CHATTERJEE, JJ. APPEAL FROM APPELLATE DECREE NO. 632 OF 1907. BABU PREOBAST NARAIN SINGH, Plaintiff, Appellant v. MURAT BAI AND OTHERS, Respondents. 24th May 1909.

*Bengal Tenancy Act (VIII of 1885), secs. 105, 109A (3)—Fair rent, settlement of—Land not liable to rent, plea if maintainable.*

The appeal arose out of an application by the landlord under cl. (2) of sec. 105 of the Bengal Tenancy Act for the settlement of fair rent in respect of certain land described in an entry in a recent record-of-rights as *kabil lagan* and a fair rent was accordingly settled by the Assistant Settlement Officer. The Defendants (tenants) appealed to the Special Judge who allowed the appeal and dismissed the application holding that it had not been shown by the Plaintiffs that their claim to assess the land to rent had been made within the period permitted by the general law of limitation.

A preliminary objection was taken to the present appeal that no second appeal lay under sec. 109A, cl. (3) of the Bengal Tenancy Act.

*Held*—That as the decision was not a decision settling rent, the appeal lay.

The case being governed by the old law before the amending Act of 1907 was passed, it was not open to the Court below in dealing with an application under sec. 105 of the Act to consider the question whether or not the land was subject to rent.

*Shambhu Chandra Hazra v. Purma Chandra Pal*, (12 C. W. N. 122), referred to.

*Babus Umakali Mukerji, Joy Gopal Ghosh and Nares Chunder Singh* for the Appellant.

*Babu Khetra Mohun Sen* for the Respondents.

*Appeal allowed.*

*Case remanded.*

A. T. M.



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### REPORTS (See Index.)

THE CASE OF *King-Emperor v. Annada Chaitan Thakur*, popularly known as the Nattore Mail Robbery case, is reported at p. 757 of this issue. In this case the counsel for the accused raised two points of law, viz., that a Magistrate, other than a Presidency Magistrate, while tendering pardon to a would-be approver, should record reasons for so doing, otherwise the testimony of the approver is not good evidence against the accused and, secondly, that in a reference under sec. 307, Criminal Procedure Code, the High Court ought not to enter into evidence and upset the verdict of the jury unless the charge of the Sessions Judge to the jury shows that the verdict of the jury was unreasonable or perverse.

THEIR LORDSHIPS (CASPERSZ AND RYVES, JJ.) overruled both the points. Broadly speaking the view taken by their Lordships may be correct. But still we think it desirable that the High Court should require the Magistrates to strictly conform to the direction of the law as contained in sec. 337 (4), Cr. P. C. When a Magistrate improperly grants a pardon to a would-be approver it may be that the accused are not

materially prejudiced. But still it would be contrary to public interest should pardon be granted without strict necessity to persons who deserve to be punished. Further, if the Magistrates are led to think by this ruling that it is not incumbent upon them to record reasons, the result might be that they would readily tender pardon at the request of the police without carefully considering the propriety or the real necessity of granting such pardon. This is also likely to increase the opportunities of the police of fabricating false cases.

AS REGARDS THE SECOND QUESTION, IN A REFERENCE under sec. 307, Cr. P. C., the High Court may, no doubt, enter into evidence and see for itself whether the opinion of the jury was right or not, but the opinion of the jury ought not to be lightly set aside. As to findings of fact the opinion of the jury ought to have greater weight with the High Court than the opinion of the Judge. It is, therefore, necessary that a Sessions Judge while making a reference to the High Court should in his letter of reference make out a case that the verdict of the jury was perverse or unreasonable; or if the Sessions Judge omits or fails to do so, the prosecuting counsel at any rate must do so before the Judges should consent to go into the records and examine the evidence for testing the verdict of the jury.

AS REGARDS THE MERITS OF THE PROSECUTION case we have no hesitation in saying that the case betrays circumstances which call for a sifting inquiry into the conduct of the police in connection with it. The police are unable to detect the perpetrators of an atrocious crime. They send up the accused to take their trial and spare no pains to secure a conviction. The accused are, however, acquitted after mature consideration by the High Court. There are evident indications in the case that the police concocted evidence and tutored witnesses. They succeeded in apparently making out a strong case against the accused and it is only after a very careful examination of the prosecution evidence by their Lordships that the accused have been saved from the gallows. Their Lordships observe "The case for the prosecution seems to be very strong, and if the evidence of Abdus Sobhan, the

approver, and that of Durlabh, Shib Shanker, Bhawani and Bangsi can be accepted, inference is inevitable that the accused are guilty."

IT IS IMPOSSIBLE TO CONDEMN TOO STRONGLY THE conduct of the police in cases like this. Why the approver and the other prosecution witnesses, many of whom were expressly found by the High Court to have been under the control of the police, consented to give false evidence in a case like this against persons with whom they had no quarrel whatsoever, but to whom on the contrary they owed debts of gratitude, is a question which must puzzle everybody. Could it be said that they consented to give false evidence of their own accord? Or is it that improper influence or pressure was brought to bear upon them by the police? The inference with regard to the latter supposition is indeed strong. The methods of the police in the present case, the Barrah Dacoity case and the Midnapore Bomb case seem to bear a marked family likeness, which surely call for some comprehensive action on the part of the highest executive in the land for the protection of the life and liberty of the people.

IN PREVIOUS ISSUES WE HAVE NOTICED THE differences of opinion which have prevailed in the Calcutta and Madras High Courts regarding the interpretation of sec. 476 of the Criminal Procedure Code and expressed our approval of the decision of the Full Benches in the cases of *Begu Singh v. King-Emperor*, I. L. R. 34 Cal. 551; s. C. 11 C. W. N. 568, and *Rahimadulla v. Emperor*, I. L. R. 31 Mad. 140. A Bench of the Bombay High Court in *Re Lachmidas Lalji*, I. L. R. 32 Bom. 184, expressed strong dissent from the opinion in the former case. We showed, however, on a previous occasion, that the grounds of dissent were not likely to command general approval (*vide* 13 C. W. N., pp. clxxxii—clxxxiii). We have pleasure therefore in noting that a Bench of the Allahabad High Court, composed of Knox and Griffin, JJ., have in a carefully weighed judgment (*Girwar Prosad v. King-Emperor*, 6 A. L. J. 392) expressed their approval of the main line of reasoning adopted by the Calcutta Full Bench.

THEIR LORDSHIPS OBSERVE: "BOTH IN THE Calcutta and Madras cases, the learned Judges appear to have felt the difficulty of there being any necessity of sec. 195 if months after the trial the Court can take action under sec. 476, and this appears to have influenced them a good deal in the results at which they have arrived. In this Court, the view has for long past been taken that there is wide difference between secs. 195 and 476, that under the former section responsibility for the prosecution really rests upon the private person to

whom sanction is given. In the latter it rests upon the Court which orders the prosecution. If this view be correct, and we see no reason to doubt it, there is room in the Statute Book for both secs. 195 and 476." Further on, their Lordships say "we agree fully with all that has been laid down in the rulings cited to us as to the intention of the Legislature and the desirability that any action taken under sec. 476 should be as prompt as possible." "But," their Lordships add, "sec. 476 appears to us to lay down more than one starting point from which such action would be taken," and "we cannot help feeling that the words 'brought under its notice' which occur in sec. 476 and also sec. 478 may not have been sufficiently before the minds of the learned Judges who decided these cases." At the same time their Lordships hold that the case of *Krishna Gobinda Dutt*, 9 C. W. N. 859, which the Full Bench approved, was in the circumstances of that case, rightly decided.

WHILST GENERALLY APPROVING OF THE VIEW taken by Knox and Griffin, JJ., we must say that their last quoted observation regarding the Calcutta Full Bench decision is hardly justified. It should be pointed out that the Full Bench was not considering a case in which an offence had been "brought to the notice" of the Court but one alleged to have been committed "before it." We do not think that the Full Bench of the Calcutta High Court would have taken any different view from that of Knox and Griffin, JJ., had it been a case in which the alleged offence was "brought to the Court's notice." Now that we find that the High Courts of Calcutta, Madras and Allahabad are agreed in their interpretation of sec. 476, we may reasonably expect that the High Court of Bombay will also be converted to their view. Should the Legislature consider it desirable to remove the conflict, we are sure that it would not lightly interfere with the interpretation which has secured the approval of three High Courts.

#### CRIMINAL CASES OF 1908.

(Continued from p. cxcix).

LAND DISPUTES, SEC. 145.—[Initiatory proceedings]. An order under sec. 145, in the course of a proceeding commenced under sec. 107, without an initiatory order having been first drawn up, was held to be a mere irregularity (*Debi v. Sheodat*, 30 All. 41). This decision is consistent with *Sabid v. Lakshmi*, 7 C. W. N. 599, and *Re Chinnapudayan*, 30 Mad. 548, but directly contrary to a whole series of cases (25 W. R. Cr. 74; 3 B. L. R. A. Cr. 76; W. R. (1864), p. 2; 1 R. J. & P. J. 236; 2 W. R. Cr. 31; 3 Ib. 9; 4 Ib. 26; 9 Ib. 64; 17 Ib. 53; *Sukree v. Ram*, 30 All. 443;

*Banwari v. Hriday*, 32 Cal. 532: *Re Haji*, 10 C. W. N. 333, and even the Allahabad case in 25 All. 537, 540.

[*Absence of notices*]. Where there was no personal service of notices on the parties, no local publication, and neither party filed written statements, held that the proceedings were without jurisdiction (*Ahmed v. Parbati*, 35 Cal. 774).

[*Evidence*]. An order based on evidence solely and substantially recorded by a Subordinate Magistrate is void as without jurisdiction (*Arumuga v. Venkatasubbier*, 31 Mad. 82: see *Re Baikant*, 3 C. L. R. 194, and *Rotha v. Muneswar*, 34 Cal. 840). An order in the absence of a party served with notice on the written statement of the opposite party without any evidence taken is without jurisdiction (*Nojem v. Jamalali*, 12 C. W. N. 771: see 6 C. W. N. 925: 10 C. W. N. cii). So also an order made in the presence of the parties, but only on the written statement of one and on the failure of the other to file the same (5 C. W. N. 71: 8 C. W. N. 642: 30 Cal. 928: see 6 C. L. R. 193: 8 C. W. N. 76). An order without any evidence was set aside in *Sharafat v. Hira*, 12 C. W. N. cclii.

[*Summoning witnesses*]. A refusal to summon witnesses was held not to be a question of jurisdiction but of procedure. (*Keshab v. Haradhane*, 12 C. W. N. clxxi: and see also 32 Cal. 1093 distinguishing and dissenting from 11 Cal. 762, 21 Cal. 29, 30 Cal. 508, 508n and 2 C. L. J. 286n).

[*Question of possession not rights*]. The Magistrate has no jurisdiction to inquire into the rights of the parties, but only the question of possession (*Ajib v. Asman*, 7 C. L. J. 369). He cannot go into the rights of the parties under survey and settlement proceedings and base his finding thereon instead of oral evidence in the case (*Kochai v. Romesh*, 35 Cal. 795).

[*Effect of decree*]. An auction-purchaser who has received the delivery certificates, but not symbolical possession, cannot be declared in possession (*Ragava v. Krishnasami*, 31 Mad. 416). Symbolical possession given to an auction-purchaser is sufficient, in the absence of other evidence, as between the parties to the suit (25 W. R. Cr. 74, 79, 80: *Madho v. Jug*, 6 C. W. N. 841). Such possession given in execution of a decree *inter partes* should be followed by the Magistrate (29 Cal. 208 following 26 Cal. 625). A recent decree in favour of one party ought to be upheld (32 Cal. 796: 7 C. W. N. 118: 5 C. W. N. 563). But it has recently been held in Allahabad in *Jhinaai v. Ram*, 31 All. 150, that this is not a matter of jurisdiction.

[*Postponement sine die*]. It is illegal to postpone a case under sec. 145 *sine die* pending settlement, proceedings not proved to be near, and to continue the attachment (*Abdul v. Rahamuddi*, 8 C. L. J. 504), but such postponement, when such proceed-

ings are very near, is not illegal (*Guru v. Weatherall*, 13 C. W. N. 601).

[*Effect of order under sec. 145 on Civil Court*]. The existence of an order under sec. 145 is no bar to a suit under sec. 9 of the Specific Relief Act (*Jwala v. Ganga*, 30 All. 331): see on this question, *Moore v. Manoranjan*, 12 C. W. N. 696 at p. 701, and the cases cited therein.

[*Attachment*]. A Magistrate has no jurisdiction to attach the property in dispute when the parties appeared and applied for time but did not file written statements. (*Sheikh Mansar v. Mahiullah*, 12 C. W. N. 896).

[*Costs*]. The assessment of costs without notice is without jurisdiction (*Kali Prasad v. Kali*, 12 C. W. N. ccvii: see also 28 Cal. 302: 10 C. W. N. 1030), but not a question of their sufficiency (4 C. W. N. lxxxiii: 9 C. W. N. 887: 29 Mad. 373, 375).

E. H. MONNIER.

(To be continued.)

#### • CURRENT INDIAN CASES.

KARRIVENKATTA v. KOLLA, I. L. R. 32 Mad. 76.  
*Partnership—Suit.*

It has never been a hard and fast rule that the Court will not interfere in a dispute between the partners, simply because the dispute relates to a matter connected with the partnership business. To enforce a particular term of a partnership or to restrain its breach is not substantially open to the same objections as enforcing the performance of a contract to carry on a particular business.

PALANI v. RANGIA DOSS, I. L. R. 32 Mad. 83.  
*Civil Procedure Code (Act XIV of 1882), sec. 562—Order of remand—Appeal—Waiver—Consent.*

In a second appeal against the decree of the lower Appellate Court, held that a previous order of remand under sec. 562, C. P. C., (which was not appealed against) was bad and irregular and could not be validated under sec. 578, C. P. C., and the fact that no appeal was preferred did not amount to consent or waiver on the part of the party who did not appeal.

GURUMURTHI v. GURAMMAL, I. L. R. 32 Mad. 88.  
*Property inherited from a collateral.*

In property inherited from collaterals, the male descendants of the person who inherits are not coparceners in it with him.

ADAIKALAMMAI v. RAMAN, I. L. R. 32 Mad. 90.  
*False document.*

Merely giving a false description to the name of an executant of a document comes within the purview of sec. 464, I. P. C.

ATWARI v. MAIKU, I. L. R. 31 All. 1. *Appeal—Execution—Small Cause Court decree sent for execution to Munsif.*

An order passed by a Munsif in execution of a decree sent to the Munsif's Court by a Small Cause Court for execution is appealable to the District Judge.

CHANDAR v. KUNDAN LAL, I. L. R. 31 All. 3. *Partition.*

Where by a compromise the applicant got his share partitioned and the shares of others remained joint, *held* that the compromise did not prevent the latter from partitioning the property subsequently.

LALTA PRASAD v. SALIG RAM, I. L. R. 31 All. 5. *Legacy to an adopted son—Persona designata.*

Where there was a legacy to the testator's wife for life and after her death to L, his adopted son, *held* that L took as a *persona designata*.

SRIDHAR v. RAM LAL, I. L. R. 31 All. 7. *Next friend—Want of formal order.*

No suit ought to be defeated because no formal permission was obtained for a next friend to sue on behalf of a minor.

AKBAR KHAN v. TURABAN, I. L. R. 31 All. 9. *Limitation Act, Sch. II, Art. 120.*

Where the Defendant's name was entered in the revenue papers in the year 1895, *held* that Plaintiff's suit for declaration of his title to the property after six years is barred by limitation.

JOTI PRASAD v. AZIZ KHAN, I. L. R. 31 All. 11. *Mortgage suit—Title paramount.*

The question as to the title of a person setting upon a title paramount cannot be raised in a mortgage suit.

SADAR-UD-DIN v. CHAJJU, I. L. R. 31 All. 13. *Mortgage deed—Compromise deed affecting terms thereof.*

The terms of a compromise deed in a mutation proceeding cannot affect the terms of a registered mortgage deed.

PIARILAL v. NAND RAM, I. L. R. 31 All. 19. *C. P. C., sec. 13.*

A suit upon a mortgage is not maintainable when a previous suit upon the same mortgage was compromised and a money decree was obtained.

JAGARNATH v. LALTA PRASAD, I. L. R. 31 All. 21. *Infant—Misrepresentation—Sale.*

Where a person purchases a property from another upon a misrepresentation by the latter that he is of age whereas he is not, *held* that the minor is not entitled to get the property back

without restitution to the purchaser for the benefit obtained.

## Reviews.

THE REVENUE SALE LAW. Being Act XI of 1859 (with all subsequent modifications, fully annotated). By Digambar Lal, M.A., B.L., member of the Provincial Service. Calcutta. Weekly Notes Printing Works, 3, Hastings Street. 1909.

Act XI of 1859, which this handy little book professes to annotate is a statute containing 62 sections. The administration of this act lies partly with the Civil Court and partly with the Revenue authorities. A properly annotated edition of the Act should take into account not only the decisions of the High Court and the Judicial Committee bearing on its provisions, but also the rules framed by the Board of Revenue. This the author has done in the present work. In the handling of the case law and the Board's Rules he shows insight as well as capacity for methodical arrangement. Act VII (B. C.) of 1868 is reprinted at the end of the work and the case-notes are quite up-to-date. We have no doubt that practitioners in dealing with cases under the Act, will find this edition of very great assistance.

THE HINDU WILLS ACT, Being Act No. XXI of 1870, with the sections of the Indian Succession Act, copious notes of cases and references. By Alexander Kinney, Deputy Administrator-General, Bengal, Calcutta. Printed and published by B. Baral at the "Law Publishing Press." 3-5, Bow Street. 1909.

We are glad to find that the author has followed up his edition of the "Probate and Administration Act" with this edition of the Hindu Wills Act. The present work belongs to what has come to be known as "case-noted editions" of the Codes. Under each section the cases reported in the four series of the Indian Law Reports, the Bengal Law Reports, The Weekly Reporter, The High Court Reports and The Calcutta Weekly Notes are noted separately in the chronological order. After dealing with the few sections of the Hindu Wills Act in Part I, the sections of the Succession Act which have been extended by the former enactment to the cases of Hindus, &c., are similarly dealt with in Part II. The list of cases as also the subject index are so drawn up that one can see at a glance which sections of the Wills Act or the Succession Act or both the particular case or item bears upon. A brief history of the Statute, the Statement of Objects and Reasons, the Report of the Select Committee and the proceedings in Council in connection with the Hindu Wills Act are given in the Introductory part. The book ought to prove useful.

NOTES ON THE LAW OF CONFESSIONS. *By S. Roy, Bar-at-Law. Third Edition. Hare Press, Calcutta. 1909.*

The appearance of a third edition of this unpretending little compilation not only proves its value to practitioners but also that the author's modesty in christening it as mere "Notes" has in no way stood in the way of its success. The book gives a fairly complete repertory of the statutory provisions and the Indian and English cases bearing on "confessions," "dying declarations" "approvers" and "approver's evidence." The cases are well arranged and the main legal ideas concerning "confessions" and "approver's evidence" are ably analysed. This edition is quite up-to-date, and will, we have no doubt, prove as useful as its predecessors.

THE PENAL LAW OF INDIA. Being a commentary, analytical, critical and expository, on the Indian Penal Code (Act XLV of 1860, as amended up to date). *By H. S. Gour, M.A., D.C.L., LL.D. (Cantab & Dub.). In two Volumes, Vol. I. (Secs. 1-298). Calcutta, Thacker, Spink & Co. 1909.*

Dr. Gour's peculiar genius for producing learned commentaries on the Codes, to which we already owe a most voluminous and exhaustive treatise on the Transfer of Property Act, has found an even more congenial field in the subject of the present work. The present volume (excluding an introduction of 130 pages as learned as the commentaries themselves) covers over 1100 pages. The subject-matter of each section is dealt with from every possible point of view, psychological, legal and historical and a vast amount of materials has been collected from very varied sources and made available to the profession. It is not possible within the limits of this notice to enter more minutely into the details of the work. Suffice it to say that it is being worked up on a more comprehensive scale than any other work on the subject. Judging from the present volume we have every reason to hope that the work when completed will win for itself the same reputation for learning and reliability as the author's earlier work on the Transfer of Property Act. The get-up of the work reflects credit on the publishers.

### Notes of Cases.

#### ENGLISH LAW COURTS.

COURT OF APPEAL.—*Cuthbert v. Roberts, Lubbock & Co.* Before the MASTER OF THE ROLLS, LORDS JUSTICES BUCKLEY and KENNEDY. 20th May 1909.

#### General banker's lien.

This was an appeal from the decision of Mr. Justice Joyce. The material facts may be shortly stated as follows:—The Plaintiff wished to put

£1,000 in some American shares, and asked Mr. Cancellor, who was then a member of the London Stock Exchange, if he could arrange to borrow the money for her, and added that she could send a certificate of 100 Provident Clerks shares worth £14-7s. each. Mr. Cancellor saw the manager of the Defendant Bank. The result of the interview, as appears from a memorandum by the manager was as follows:—"F. Cancellor can have up to £1,350 for three months at Bank rate minimum 5 per cent., and transfer certificate (with letter of authority) of 100 shares Provident Clerks." This showed that the Bank had notice that the shares did not belong to Mr. Cancellor, but that they were to be placed at his disposal by means of a written authority from the unknown owner.

On 20th September 1907, Mr. Cancellor informed the Plaintiff that he had arranged to get a loan from his bank on her 100 Provident Clerks shares, and that he had bought for her 50 American shares. In compliance with the request of Mr. Cancellor the Plaintiff executed a blank transfer and also a letter in the following terms:—"I duly authorize you to borrow money upon the 100 Provident Clerks shares for which I have handed you certificate and transfer signed by me." Mr. Cancellor took the transfer, the certificate and the authority to the Bank.

On 15th October, Mr. Cancellor wrote to the Bank asking them to credit his account with £250 "in respect of the security for, say £1,400 I left with you last week." This was done, £250 being placed to Mr. Cancellor's debit on a loan account and to his credit on his current account. Mr. Cancellor without any instructions from the Plaintiff carried over the stock until the end of October account, by which time Americans had fallen considerably. On the settling day (30th October) many cheques drawn by Mr. Cancellor were presented with the result that it was reported to the manager that Mr. Cancellor was £500 out. The manager thereupon told the cashier that the amount was covered by the security. The cheques were honoured, and through a mistake further cheques to a very large amount beyond the value of the shares were also honoured. Mr. Cancellor was hammered the next morning and subsequently declared bankrupt. The Plaintiff never obtained the American shares. And the Bank claimed a charge for the full value of the shares and alternatively for £500 for overdraft. Mr. Justice Joyce held that the shares were charged with only £250 and interest; and subject to this amount being discharged, the Plaintiff was entitled to have her shares restored to her.

The MASTER OF THE ROLLS in the course of his judgment dismissing the appeal observed as follows:—

"There was a request to advance on the security and a compliance with the request, and it is wholly

unimportant that the documents deposited were not opened or seen by the manager. But there is a ground upon which I think the Plaintiff is entitled to succeed. The bankers cannot claim a general banker's lien except upon the customer's own property. The transaction between the manager and Cancellor was not a deposit to secure the balance from time to time due on his current account. The deposited authority was merely "to borrow money upon" the shares. If a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is really a request for a loan, and if the cheque is honoured the customer has borrowed money. But it does not follow that such a simple transaction is a borrowing upon a security not belonging to the customer and known to the bankers to be deposited for a special purpose. In my opinion the mere drawing a cheque by Cancellor, without any reference to the security, was not a borrowing upon the Plaintiff's shares. It was not intended by him to be an act done in pursuance of the authority. I may add, that in any point of view, the Bank could not claim more than the £500, for they did not intend to honour cheques beyond that amount on the faith of the deposit."

The Lords Justices also dismissed the appeal.

*Messrs. Hughes, K. C., and D. Pollock* for the Appellants.

*Messrs. Younger, K. C., and P. F. Wheeler* for the Respondent.

B. D.

*Appeal dismissed.*

**HIGH COURT OF JUSTICE, CHANCERY DIVISION.**—*Vincent v. Palmer*. Before Mr. Justice SWINFEN EADY. 6th May 1909.

*Nuisance by noise—Neighbourhood to be considered.*

This was a suit for injunction and damages by a hostel proprietor who alleged that the Defendant's business which was being carried on in the small hours of the morning amounted to a nuisance and resulted in loss to the Plaintiff. The defence was that the noise was due to the other business carried on in the market and that the Defendant's business formed no appreciable addition to the noise of the market.

The learned Judge in giving judgment for the Defendant observed:—

"The question I have to consider is whether the Plaintiff has established the existence of a nuisance by noise, and in dealing with that question I must have regard to the character of the neighbourhood in which the business is carried on. The law has been recently dealt with by the House of Lords in the case of *Polsue v. Rushmer*, (1907) A. C. 121, where the Lord Chancellor quoted Lord Halsbury's remarks in *Colls v. Home and Colonial Stores*, A. C. 179 (1904), to the effect that in

every such case the question was one of degree.

The Plaintiff has failed to prove any such addition, distinguishable and separable from the general noise, as would entitle the Court to say that the Defendant's business was so carried on as to amount to a nuisance."

*Mr. Frank Russell, K. C.,* (with him *Mr. F. D. Israil*) for the Plaintiff.

*Sir C. A. Cripps, K. C., Messrs. Micklem, K. C., and C. Church*, for the defence.

*Suit dismissed with costs.*

## PRIVY COUNCIL.

[ON APPEAL FROM OUDH.]

LORD MACNAGHTEN.

LORD ATKINSON.

LORD COLLINS.

SIR ANDREW SCOTLAND.

1909,

11, May.

FAKIR BUKHSH, and ors.,  
Appellants,

v.

SAIYAD AULAD HUSAIN,  
and ors., Respondents.

*Special leave—Finding as to custom—Bhatthi Zemindars—Succession.*

This was a petition for special leave to appeal to His Majesty in Council. The Petitioners instituted a suit against the Respondents to recover possession of certain villages, the last male owner of which was one Makhdum Bakhsh who died in 1854, leaving him surviving as his heirs under the Mahomedan Law a widow Mussamat Jhabar and the Petitioners. The said Makhdum Bakhsh was a Bhatthi by clan, a Hindu convert to Islam, and the Petitioners' case was that the succession to his estate was not governed by the Mahomedan Law but by a custom under which the estate passed to the widow for life with reversion to the next heirs of the husband. They alleged that in accordance with the said custom Mt. Jhabar succeeded to the whole estate of the deceased and on her death on the 20th September, 1903, the said estate passed to the Petitioners. The Petitioners asserted that they were the descendants of Imamzohad Khan, who possessed Perganahs Mawai and Basondeh in the time of the Emperor Sultan Alauddin Ghor, and on whose death the Petitioners' ancestor Kale Khan, son of Imamzohad Khan, inherited Basondeh and his other son Mina Khan took Mawai. They alleged that the said custom of inheritance was the rule of succession to the estates of all Bhatthi Zemindars in Perganah Basondeh who claim descent from Kale Khan.

In proof of the said custom the Plaintiffs produced 22 Wajib-ul-araiz relating to villages in Perganah Basondeh in which the custom was recorded; they also produced a number of instances in which the custom had in practice been acted upon; and filed records shewing two occasions on which the custom had received judicial recognition.

To contradict the existence of the said custom the Defendants filed the *Wajib-ul-araz* of the villages in dispute and of the villages in Perganah Mawai, and also adduced instances of succession at variance with the said custom. The Subordinate Judge decided that the alleged custom was not proved and dismissed the suit. On appeal the Judicial Commissioners upheld this judgment and decree of the Court below. On the 10th July 1908, the Judicial Commissioners refused leave to appeal to His Majesty in Council. Mr. L. G. Evans, Judicial Commissioner, observed as follows:—"It is contended that the decision of this Court would be binding upon all the Bhatthi Zemindars in Perganah Basondeh. Here are apparently some 29 villages held by these Bhatthi Zemindars in this Perganah and the Appellants wish to enforce a custom set forth in the *Wajib-ul-araz* of 22 villages not held by them and ignore the *Wajib-ul-araz* of the villages in suit. This Court held that the *Wajib-ul-araz* of the 22 villages not in suit were not sufficient proof that the custom set up by the Appellants applied to the villages in suit. The above evidence in the case indicates some kind of distinction between the rule of succession adopted by the predecessors of the Appellants and the other zemindars of the same tribe in Basondeh. In my opinion the decision in this case governs only the villages in suit and cannot be extended to other villages held by members of the same clan.

Mr. E. Chamier, Judicial Commissioner, observed as follows:—

"The principal contention was that the case was otherwise a fit one for appeal. We ought to be satisfied that there is a fair case for argument. Having read the judgment of both Courts I have come to the conclusion that the vital question in the case is really one of fact."

*Mr. Leslie DeGruyther, K. C., (Mr. Jackson with him, for the Petitioners submitted that the rule of succession to the property of the Bhatthi Zemindars in Perganah Basondeh was not the Mahomedan Law of inheritance. He contended that the *Wajib-ul-araz* papers of the villages in the said Perganah other than those in dispute together with the oral evidence and previous judicial recognition were sufficient to establish the custom alleged, and that the Courts in India had wrongly admitted in evidence as legal contradiction of the said custom the *Wajib-ul-araz* papers of the villages in dispute and of the villages in Perganah Mawai. He submitted that a large number of instances of recognition of the custom in practice and a few number of instances of succession at variance with the said custom were established by the Revenue Registers which were wrongly rejected by the Courts in India. He urged that the decision in the present suit would affect not only the rights of the parties to the suit but would be taken to finally establish a*

rule of descent contrary to the said custom among all the Bhatthi Zemindars of the said Perganah.

*G. E. A. Ross for the Respondents was not called upon.*

THEIR LORDSHIPS' order was delivered by LORD MACNAGHTEN:—

Their Lordships are unable to advise His Majesty to grant the petition.

*Messrs. T. L. Wilson, Solicitors for the Petitioners.*

*Messrs. Barrow Rogers and Nevill, Solicitors for the Respondents.*

*Petition rejected with costs.*

## CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before CASPERSZ and RYVES, JJ. CRIMINAL REVISION No. 361 OF 1909. LACHMAN GOPE, Petitioner v. THE EMPEROR. 17th May 1909.

*Penal Code, secs. 403 and 411—Two persons driving along another's buffalo—Evidence necessary for the conviction of one of them, when the other not identified.*

The Petitioner was convicted under sec. 411, I. P. C., and sentenced to six months' rigorous imprisonment. It appears that the Petitioner and another man were seen driving along a buffalo which belonged to the complainant. While they were doing so, they were suspected by certain wayfarers who asked them why they were driving along the buffalo which they knew belonged to the complainant. On this it was alleged they answered that they were the servants of the complainant. The Petitioner and his companion were prosecuted; at the trial the Petitioner was identified by witnesses who saw him while driving away the buffalo, but the other accused was not identified. The buffalo was subsequently recovered from a third person at whose door it was found tied. Against his conviction the Petitioner appealed and his appeal was dismissed. He then obtained this rule.

Their Lordships observed:—

"The Magistrate explains that the witnesses who identified the Petitioner as one of the two men who were driving along the buffalo, were unable to identify his companion. That is an excellent ground for the acquittal of the companion. But on the same evidence it is clear that the charge against the Petitioner cannot stand because all that has been proved against him is that he was seen driving the animal on one occasion in company of another person. Whether the other person was in possession of the animal, or whether the Petitioner was in possession or whether they were both in possession, it is impossible to say."



Then there remains the question of guilty knowledge. Even if the Petitioner had driven the buffalo on that one occasion there is nothing to show that he had any guilty knowledge when so doing. We observe that the trial of the Petitioner was held for dishonest possession of the buffalo, but in our opinion, neither sec. 411 nor sec. 403 of the Indian Penal Code was applicable to the facts of the case."

*Mr. Huq* with *Moulvi Enait Karim* for the Petitioner.

B. C.

*Ruk made absolute.*

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J. and MOOKERJEE, J. LETTERS PATENT APPEAL No. 34 OF 1908. BASARUT ALI KHAN, Defendant No. 1, Appellant *v.* MANIRULLA AND OTHERS, Respondents. 2nd June 1909.

*Lessor and lessee—Covenant not to transfer—Breach—Right of re-entry—Assignment if operative.*

The appeal arose out of a suit for possession of property. On the 20th of October 1881, a permanent lease of the property in suit was executed by Defendant No. 1 in favour of Defendant No. 2 and in that lease was a covenant in these terms "you (that is, the lessee) shall not be able to dig pits and tanks or to transfer the land in any way without a letter from me to that effect." There was, however, no right of re-entry reserved. On the 7th April 1901, the lessee purported to assign her interest under the lease to the Plaintiff. All the notices and formalities required by the Bengal Tenancy Act were given and observed.

*Held*—That the assignment was operative notwithstanding the covenant, and the title passed to the Plaintiff.

*Williams v. Earle* (L. R. 3 Q. B. 739) followed.

*Babus Mahendra Nath Roy, Krishna Prosad Sarvadhicary and Satish Chunder Mookerjee* for the Appellant.

*Babu Dharendra Lal Kastgir* for the Respondents.

A. T. M.

*Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before STEPHEN and VINCENT, JJ. APPEAL FROM ORIGINAL DECREE No. 363 OF 1907. SRIGOBIND PROSAD *alias* RAJA BABU, Petitioner, Appellant *v.* MUSST. LALJHARI KOERI AND OTHERS, Opposite Party, Respondents. 2nd June 1909.

*Probate and Administration Act (V of 1881), sec. 96—Disputing the right of testator to dispose of—Interest in the estate of the deceased.*

The appeal was from an order of the District Judge dismissing the application of the Petitioner-Appellant for revocation of an order granting

letters of administration, under sec. 50 of the Probate and Administration Act, on the ground that the Petitioner had no *locus standi* for such revocation. The Will in respect of which letters of administration were granted was made by a Hindu widow purporting to convey her *stridhan* property to her daughter and to her grandson, who took out letters of administration accordingly.

*Held*—A person disputing the right of a deceased testator to deal with certain property as his own cannot be regarded as having an interest in the estate of the deceased.

*Abhiram Das v. Gopal Das* (I. L. R. 17 Cal. 48) followed.

*Babus Umakali Mukherjee and Kulwant Sahay* for the Appellant.

*Babus Provash Chunder Mitter, Chandra Sekhar Prosad Singh and Susil Madhub Mallik* for the Respondents.

A. T. M.

*Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before COXE and CHATTERJEE, JJ. APPEAL FROM APPELLATE DECREE No. 2557 OF 1907. JAGOBONDHU SAHA, Plaintiff, Appellant *v.* RADHA KRISHNA PAL AND OTHERS, Defendants, Respondents. 7th June 1909.

*Transfer of Property Act (IV of 1882), sec. 54—Estoppel, transfer by.*

The Plaintiff attempted to sell a certain land to the Defendants for Rs. 110 and put them in possession. They then attempted to mortgage the same land back to him with some other lands for Rs. 100. Neither the sale deed nor the mortgage bond was registered, and the Plaintiff brought the present suit for recovery of possession on return of the sum of Rs. 10 paid to him by the Defendants as part consideration. The Munsif gave him a decree for *khas* possession and mesne profits subject to the deduction of the sum of Rs. 10 with interest. On appeal the Subordinate Judge considered that the equities on the Defendants' side preponderated over those on the Plaintiff's and that the Plaintiff was estopped by his conduct from recovering possession. He accordingly gave the Plaintiff a decree for the unpaid balance of the consideration money, and directed that this should be a charge on the disputed land. On appeal to the High Court by the Plaintiff:

*Held*—That under sec. 54 of the Transfer of Property Act the sale can only be made by a registered instrument. The principle of estoppel cannot be evoked to defeat the plain provisions of a statute.

*Mahomedbhai v. Mausakhrani* (I. L. R. 24 Bom. 400) distinguished.

*Babu Basant Kumar Bose* for the Appellant.

*Babu Romes Chunder Sen* (for *Dr. Priya Nath Sen*) for the Respondents.

A. T. M.

*Appeal allowed.*

# THE Calcutta Weekly Notes.

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MONDAY, JUNE 21, 1909.

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### REPORTS (See Index.)

THE PAPER ON THE JUDICIAL BRANCH OF THE Indian Civil Service recently read by Sir Robert Fulton before the East India Association is quite characteristic of Mr. Justice Rampini as we knew him. It is full of that blunt truth and unconscious humour which were often a redeeming feature of the peculiar views that he used to take both as a judge and a man. It is well known that he had his own special grievances as a member of the Civil Service and these he presents in his lecture as the general grievances of the judicial branch of the service. A plain knighthood on the retirement from the High Court Bench, ineligibility as a Governor of a Province, a permanent Chief Justice of a High Court, Law Member to the Viceroy's Council, Member of the Secretary of State's Council, or Member of the Judicial Committee of the Privy Council, these, amongst others, says Sir Robert, make the judicial branch of the Civil Service not sufficiently attractive to its members. But we suppose it is not every member of the Indian Civil Service who aspires to be a provincial Governor or Member of the Secretary of State's Council and Sir Robert does not also seriously contend that it is want of sufficient inducements of this

kind that makes so many members of the Civil Service failures in the judicial line. Sir Robert in fact admits that the judicial branch has its own attractions for some men of ability. The writer does not apparently aim at consistency in his paper and proceeds to remark:—

Though the judicial is certainly the less showy and attractive branch, and may not be sought after by the rising juniors of the service, it is not to be supposed that it has not its advantages and does not attract some men of ability. Some prefer the greater independence and peace of a judicial career, and are satisfied with the dignified position of a High Court Judge, and the higher pension to be obtained by eleven and a half years' service in it.

SIR ROBERT, HOWEVER, SUFFERS UNDER NO MIS-conception regarding the real cause of the failure of civil servants in the judicial line. He attributes it to the want of an adequate knowledge of civil law amongst them before they are called upon to administer it. He says more pointedly:—

Nowhere in India, except perhaps in the Punjab, are junior civilians who elect to serve in the judicial line obliged to pass any examination in civil law, and they are appointed to officiate as District and Sessions Judges, and to exercise both original and appellate powers in cases involving abstruse questions of Hindu and Mahomedan and statute law, mortgages and equity, without their being called on to give the slightest evidence of their possession of even the most elementary knowledge of these branches of legal lore. The results are often deplorable. The newly appointed District Judges cannot fail to be at first far less competent than the native judiciary whose work they have to supervise, and whose decisions are appealable to them. They necessarily commit blunders, and though these may be corrected in second appeal or in revision, the present system involves a waste of time and power, not to mention the unnecessary expense in which it involves litigants. As an instance of what happens as things are now managed, it may be mentioned that when it became necessary recently to remove a junior civilian from the judicial branch in which he had been tried and found wanting, he complained that it was hard to take away from him his appointment as Judge "just as he was beginning to learn the rudiments of law."

SIR ROBERT, FREELY ADMITS THAT THE JUDICIAL branch is "unpopular both with the service and the public." Its unpopularity with the public may be accounted for by the above facts and the reason of its unpopularity with the service is illustrated by the following story which is certainly not wanting in some latent humour.

The great rewards of the service are entirely for the members of the executive and it is sometimes now regarded

almost a reproach to a civilian to be attached to the judicial branch, a sentiment which is fostered by the practice, followed by all local governments, of relegating to the judicial all failures in the executive branch. I remember a Secretary to the Bengal Government, Mr. H. L. Dampier, when examined as a witness by the Finance Commission, being asked what was done with an officer who failed to discharge his executive duties with efficiency. Mr. Dampier smiled, and replied that out of respect to Mr. Justice Cunningham, who was a member of the Commission, he would rather not answer that question. On being pressed to do so, he said:—"We make him a Judge." This practice still continues.

SIR ROBERT ALSO DEALS AT SOME LENGTH WITH the commercial opinion regarding the judicial branch of the Civil Service. "As a rule," he says, "the commercial public of Calcutta of whom alone I can speak, do not approve of Civilian Judges. They believe them to be subservient to Government." As regards their capacity for dealing with commercial cases, Sir Robert equally candidly says on the same authority that "Civilian Judges who have learnt their work in the interior of the country have certainly less experience of commercial cases and questions of contract than lawyers who have been in good practice in the Presidency towns." He does not controvert this opinion but mentions the name of Sir William Macpherson as an exception to the rule which goes rather to establish its truth than otherwise. With all these admissions how Sir Robert came to take the Calcutta merchant seriously who told him that if there were no more Civilian Judges on the High Court Bench, he would withdraw his capital and go home, can only be explained by his lack of humour.

AFTER DISCOURSING ON THE UNPOPULARITY AND inefficiency of the judicial branch of the Indian Civil Service, the learned lecturer arrives at two very legitimate conclusions. Either, some arrangements should be made for the better training of the civilian members of the judicial branch or that the judicial branch of the Civil Service should be abolished. With regard to the former, he only vaguely alludes to the suggestions in his speech in the Viceroy's Council in 1903 and makes no attempt to present any constructive scheme in the course of his lecture. With that remarkable candour which characterises this discourse, the lecturer admits that the future solution of this vexed question lies, so far as public opinion is concerned, in the abolition of the judicial branch of the Indian Civil Service. It is needless to say that the spectre of political danger that naturally looms large before the eyes of those interested appear to be a mere phantom to those who can look at the question dispassionately. We cannot expect Sir Robert to share the public view of the question; still we must give him the fullest credit for putting fairly both sides of the question before his audience.

What is to be the future of the judicial branch of the

Civil Service? It cannot remain in its present anomalous position, disowned as it is both by the executive and by the legal profession. Either it must be abolished or it must be improved, and its members placed on an equality with barrister Judges both in India and England. Many advocate its abolition, and contend that with so many Indians on the Bench and with so many professional Indian practitioners civilians are no longer required either for District or High Court Judgeships. It would be a perfectly logical proceeding to abolish the judicial branch of the Indian Civil Service. There is a statutory difficulty, for at present one-third of the High Court Bench must be members of the Civil Service, but that could be overcome. But would this be a wise step to take, or is this a measure that could be adopted without grave political danger?

IT IS BUT NATURAL THAT SIR ROBERT SHOULD BE oblivious of any judicial scandals connected with the judicial branch of the service to which he belonged. It is not our province to recount them. But we must say that it was hardly fair on his part to mention the name of one of the ablest and most highly respected Judges of the Calcutta High Court, namely, that of the late Mr. Justice Romesh Chunder Mitter, with what Sir Robert chooses to style a judicial scandal. That the Government pardoned a prisoner who was on examination of records found guilty of forgery by a judge of such pre-eminently judicial temperament as the late Mr. Justice Mitter might after all have been a case of misplaced executive leniency and no judicial scandal at all. Sir Robert is equally illogical in his argument that because he believes that certain junior members of the legal profession are in sympathy with disloyal agitation, therefore it would be a political peril to select our Judges from amongst the senior and successful members of the legal profession. To defend the junior members of the legal profession against such a wanton charge it is only necessary to mention that the subordinate judicial service is entirely recruited from amongst them and that it is difficult to find a more devoted class of public servants.

IT WOULD BE TOO MUCH TO EXPECT SIR ROBERT to break through the shackles of Indian official prejudices on his landing on the English soil. But still we must congratulate him for having so soon after his retirement drawn public attention on a question of such vital importance both to the Government and the people of this country. Sir Robert very appropriately opened his lecture in the following terms:—

The foundations of our empire in India rest on the principle of justice, and England retains its supremacy in India mainly by justice—not merely the justice of our Courts, but by the desire to do justice between race and race and man and man that is felt by all public servants in India, and which actuates our statesmen at the head of the Government and the most insignificant of subordinate local officials alike. Without that justice we could not hold India for a moment, for it is that which inspires the peoples of India with a feeling of confidence in us, and with a belief that in all our dealings with them

we will never act otherwise than fairly and justly, and which renders them, on the whole, satisfied and contented with our rule.

SIR EARLE RICHARDS WHO PRESIDED AT THE MEETING at which Sir Robert Fulton read his paper expressed his opinion that the average Civilian judge did not get sufficient knowledge of the law and sufficient judicial experience to discharge his high duties with the fullest credit. He thought that in the administration of India the time had come for all-round specialization and when they must make specialists on the judicial branch. He then proceeded to suggest that by putting Civilians in the third or fourth year of their Indian residence in training in the principles of law and in the practice of the Courts followed up by chamber work with lawyers at home they would get better qualified to discharge judicial duties in India. But this seems a needlessly cumbrous remedy. When plenty of trained lawyers are available for judicial service in India, why should public money be spent on Civilians for training them as judicial officers? Public opinion in India would not certainly favour any such extravagant proposals.

#### CRIMINAL CASES OF 1908.

(Continued from p. ccvii.)

SEC. 162.—This section is by no means easy to construe. This difficulty of construction arises in part from the frequent tinkering with it by the Legislature, but more so from the various judicial interpretations put upon it. The case of *Emperor v. Narayan*, 32 Bom. 111, is an illustration.

[Relation between secs. 162 and 172]. The question whether statements taken under sec. 161 could be incorporated in the special diary under sec. 172 led to conflicting decisions under the previous Code. The Calcutta High Court strongly deprecated the practice of putting them in the special diary, whether *in extenso* or in an abridged form, and held that they were not a legitimate part of such diary, and that the accused had the right of calling for them (*Mahomed Ali v. Queen-Empress*, 16 Cal. 612n; *Bikao v. Queen-Empress*, 16 Cal. 610; *Sheru Sha v. Queen-Empress*, 20 Cal. 642; and *Emperor v. Jhubboo*, 8 Cal. 739, 742, 743), provided he exercised it in proper time (16 Cal. 612n, 618n; 16 Cal. 610, 613 and cf. *Queen-Empress v. Venkataratnam*, 19 Mad. 14, 15). But the majority of the Allahabad Full Bench decision in *Queen-Empress v. Mannu*, 19 All. 390, (Banerji and Aikman, JJ. diss.) put a somewhat strained construction on sec. 172, and held that the statements were properly entered in the diary and were similarly privileged, overruling the earlier case to the contrary of *Queen-Empress v. Rudr*, All. W. N. (1896) 193; see also *Kallu v. Queen-Empress*, 29 Punj. Rec. 55. It has very recently

been repeated that the entering of such statements in the diary is an evasion of the law (*Dadan v. Emperor*, 33 Cal. 1023, 1026). The new proviso, however, deprives the question of practical significance for, whether taken down as part of the diary or not, the accused may require the Court to call for them. (*Dadan v. Emperor*, 33 Cal. 1023, 1027).

[Oral statement admissible but not the writing]. Sec. 162 of the present Code prohibits the use of the record of the statement, but does not exclude proof by oral evidence of the actual words (*Fanindia v. Emperor*, 36 Cal. 281; *Emperor v. Narayan*, 32 Bom. 111 per majority. See *Emperor v. Cherath*, 26 Mad. 191; *Emperor v. Stewart*, 33 Cal. 1023, 1029; *Isab v. Queen-Empress*, 28 Cal. 348; *Sankappa v. Emperor*, 27 Mad. 127, 130). In *Emperor v. Narayan*, Beaman, J., held that even oral proof was inadmissible, and in *Emperor v. Muthia*, 30 Mad. 466, 468, the record itself was held admissible under sec. 145 of the Evidence Act. In this respect the law was the same under the Codes of 1861, sec. 145 (2 W. R. Cr. L. 20; 4 W. R. Cr. L. 2, 6, 8; 8 W. R. Cr. 35; 17 W. R. Cr. 5), of 1872, sec. 119 (11 Bom. H. C. R. 120, approved of in 8 Cal. 154 and followed in 11 Bom. 657; and see also 9 Cal. 455; 6 C. L. R. 47), and of 1882, sec. 162 (11 Bom. 657, followed in 11 Bom. 659, 661, 15 All. 25; 7 All. 57 and 27 All. 469).

[Mode of use of statement]. A previous statement may, under sec. 155 of the Evidence Act, be used to contradict a witness, and the record put in under sec. 145 for that purpose after compliance with its terms, or to corroborate him under sec. 157. It will now be considered how far sec. 162 has modified these general provisions of the Act. (1) *Contradiction of witnesses*. A prosecution witness can undoubtedly be contradicted, on behalf of the defence, by his previous inconsistent statement by examining the recording officer, but the record can be used by the latter only to refresh his memory (*Dadan v. Emperor*, 33 Cal. 1023; *Queen-Empress v. Sitaram*, 11 Bom. 657, following 11 Bom. H. C. R. 120, and followed in 11 Bom. 659, 661, 15 All. 25, and 27 All. 469). But the witness must be first cross-examined on the previous statements (see sec. 145, Evidence Act): their use for the first time to refresh a police officer's memory not being justified (*Dadan v. Emperor*, 33 Cal. 1023). An important question arises as to what the accused can do if the police officer refuses to refresh his memory. No doubt in the case of the special diary the accused cannot compel a refresher (*Emperor v. Jhubboo*, 8 Cal. 739, 745), but it has been held in *Emperor v. Kali*, 8 Cal. 154, 156, 157, that a witness cannot be compelled to refresh his memory from a document unless the document is either in possession of the cross-examiner, or is, at least, such as he can insist on having produced." The new proviso gives the accused the right of insist-

ing upon production, and he could, therefore, now compel refresher, though the view in *Dadan v. Emperor*, 33 Cal. 1023, 1028 is against this contention. At all events the Judge, though not bound to compel a witness to refresh, has discretion to do so (*Emperor v. Jhubboo*, supra p. 745, and see *Queen-Empress v. Sagal*, 21 Cal. 642, 655). It is not so clear upon the wording of the proviso whether the prosecution can contradict its own witnesses, when recalcitrant, or the defence witnesses by previous inconsistent statements. The right was denied by Beaman, J., in *Emperor v. Narayan*, but it has been held in the affirmative in *Emperor v. Jagardeo*, 27 All. 469, 471, following 11 Bom. 657 and 15 All. 25, and by the majority in *Emperor v. Narayan*. The decision in *Fauindra v. Emperor*, 36 Cal. 281, appears to favour this view also. (2) *Corroboration of witness*. Sec. 162 does not prohibit corroboration of a prosecution witness, under sec. 157 of the Evidence Act, by previous consistent statements. (*Fauindra v. Emperor*, supra; *Emperor v. Narayan*, supra p. 129; and see 11 W. R. Cr. 25 and 7 W. R. Cr. 31 under sec. 31 of the Evidence Act of 1855 but see, *contra*, under the Code of 1882: *Emperor v. Jijibhai*, 22 Bom. 596; *Queen-Empress v. Bhairab*, 2 C. W. N. 702, 712; and 8 W. R. Cr. 35.)

[*Not substantive evidence*.]—The record cannot be used as substantive evidence against the accused and as the basis of his guilt (*Emperor v. Cherath*, 26 Mad. 191; *Emperor v. Jagardeo*, 27 All. 469, 471; *Emperor v. Narayan*, 32 Bom. 111), nor as corroboration of a confession by the accused (*Emperor v. Narayan*, supra). The statement of a witness before a police-officer cannot on retraction be used against the witness (*Sankappa v. Emperor*, 27 Mad. 127, 130). A statement by a witness, during the investigation of an offence, to a police-officer is inadmissible against him on his trial for that offence (*Queen-Empress v. Jadub*, 27 Cal. 295, 302; *Emperor v. Stewart*, 31 Cal. 1050, 1052), nor is the record admissible against him on a subsequent trial for perjury (*Isab v. Queen-Empress*, 28 Cal. 348; see *Re Sheikh Dabu*, 6 C. L. R. 47), or for bringing a false charge under sec. 211, I. P. C., (*Chinna v. Emperor*, 31 Mad. 506).

E. H. MONNIER.

(To be continued.)

#### CURRENT INDIAN CASES.

*EMPEROR v. DUNGIR SINGH*, I. L. R. 31 All. 36. *Stamp Act, Sch. I, Art. 53 (c)*.

A receipt for money paid under a decree for rent is not exempted from stamp duty under Sch. I, article 53 (c) of the Stamp Act.

The High Court has no jurisdiction to interfere with an order of sanction to prosecute a witness for perjury committed in the course of an enquiry

under the Legal Practitioners Act relating to the professional misconduct of a pleader on an order of a High Court Judge for enquiry and report.

*TEHILRAM v. KASHIBAI*, I. L. R. 33 Bom. 53. *Lien for unpaid purchase money*.

Acknowledgment of the receipt of the whole of the purchase-money prevents the vendor from setting up a lien for the unpaid purchase-money as against a mortgagee for value without notice.

*RUKHANBAI v. ADAMJI*, I. L. R. 33 Bom. 69. *Arbitration—Consent decree*.

Where there was no written submission as required by sec. 4 of the Indian Arbitration Act, the award by the so-called arbitrator cannot have any legal consequences and there cannot be any adjustment consequently under sec. 375, C. P. C.

*EMPEROR v. TRIPOVANDAS*, I. L. R. 33 Bom. 77. *Misjoinder of charges—Penal Code, secs. 124A, 153-A*.

A trial of offences under secs. 124A and 153A is not bad on the ground of misjoinder.

*RAMA KRISHNA v. TRIPURABAI*, I. L. R. 33 Bom. 88. *Hindu Law—Adoption—Divesting*.

A transfer of an estate by a Hindu widow ceases to have any effect after an adoption made by her.

Where a Hindu widow makes an adoption it has the same effect as her death except that she is entitled to maintenance.

*KAVERIAMMA v. LINGAPPA*, I. L. R. 33 Bom. 96. *Transfer of Property Act, sec. 50*.

A tenant is not liable for rent to the true owner for rent paid *bona fide* to a third person who in good faith held such property.

*BAIMANI v. KHIMCHAND*, I. L. R. 33 Bom. 104. *C. P. C., (Act XIV of 1882), sec. 505—Appeal*.

No appeal lies against an order of the District Judge refusing to authorize the Subordinate Judge to appoint a Receiver as recommended by the latter, such an order being an order under sec. 505, C. P. C.

*PUTLABAI v. MAHADU*, I. L. R. 33 Bom. 107. *Widow Re-marriage Act (XV of 1856)—Adoption*.

A Hindu female can exercise the right to give her son in adoption although she may have re-married and under the Widow Re-marriage Act when the right of guardianship is transferred from the mother, it does not take with it the right to give in adoption.

JAMSHEDJI v. SOONABAI, I. L. R. 33 Bom. 122.  
*Charitable trust—Perpetuities.*

"Sitting on the original side of this Court, I concede at once that I am bound ordinarily to follow the judgment of another Judge when he has decided a question of law—or laid down certain principles of practice or procedure—or judicially construed any provision of the law prevailing in the country." (Per Davar, J.)

But the Judge is not bound to follow findings of facts.

The English Law of Mortmain does not extend to British India (p. 188).

The Rule against perpetuities does not apply to charitable trusts.

Trusts and bequests of lands or money—for the purpose of devoting the incomes thereof in perpetuity for the purpose of performing Muktd, Baj, Yejushni and other like ceremonies, are valid 'charitable' bequests, and as such exempt from the application of the Rule of Law forbidding perpetuities.

EMPEROR v. BABULAL, I. L. R. 33 Bom. 213.  
*Penal Code, sec. 188.*

An obstruction to the execution of duties of a clerk in the cess collection department of a District Municipality is punishable under sec. 188, I. P. C., as he is a public servant.

JEHANGIR v. THE HOPE MILLS, I. L. R. 33 Bom. 216. *Practice—Account suit.*

Where a decree for an account was silent as to how that account was to be taken and an account was taken under the decree by a person appointed jointly by the parties, held that the Court was not competent to direct necessary inquiries or accounts to be made or taken as a new agreement had come into existence superseding the decree.

In re BALGANGADHAR TILAK, I. L. R. 33 Bom. 221. *Criminal Procedure Code, sec. 234.*

There was no irregularity in a trial when offences under secs. 124A and 153A were tried along with another offence under sec. 124A.

## Notes of Cases.

### ENGLISH LAW COURTS

CHANCERY DIVISION.—*Rickets v. Church Wardens of the Parish of Enfield.* Before JUSTICE NEVILLE. 1909, I Ch. p. 544. 26th, 27th and 28th January 1909.

—*Landlord and Tenant—Covenant running with land.*

In a lease there was a covenant to the effect that the lessors and their assigns would not erect or permit to be erected on the land adjoining the

demised premises any building in front of the building line. One of the questions in this case was as follows:—"Does that covenant run with the land."

In holding that the covenant ran with the land JUSTICE NEVILLE observed as follows:—

"Does that covenant touch or concern the land demised? If I were left to my own unaided judgment I should say it does, because it seems to me that there is a difference in the nature of the thing demised according as it has or has not a right of outlook attached to it. But I am not left to my own unaided judgment in considering the question, because I think an analogous question arose in *Rogers v. Hosegood*, [1900], 2 Ch. 388."

PROBATE DIVISION.—*Gill v. Gill.* Before JUSTICE BARGRAVE DEANE. L. R. 1909, Probate Division, p. 157. 10th and 12th March 1909.

*Revocation of Will—Tearing off a Will without authority—Ratification.*

The Will in question was torn up in the presence of the testator by his wife; there was not a particle of evidence to suggest that he had authorised it; the wife said that he had not so done and her evidence was accepted that she did it, in a fit of temper; the testator was at that time beside himself with drink; upon the facts it was impossible to hold that the act of destruction was performed with the authority of the testator.

One of the questions in this case was as to whether the act of destruction of the Will which was without authority at the time could be ratified.

Held—That "no amount of authority afterwards can be brought into play so as to ratify an act without authority at the time."

JUSTICE BARGRAVE DEANE said as follows:—

If a testator under such circumstances desired that the act of destruction, performed without his authority at the time should prevail, he had it in his power effectually to revoke his Will in accordance with the provisions of the Wills Act.

### PRIVY COUNCIL.

LORD MACNAGHTEN.	} THE OWNERS OF "Maori King" v. HIS BRITANNIC MAJESTY'S CONSUL-GENERAL AT SHANGHAI.
LORD ATKINSON.	
LORD COLLINS.	
SIR ANDREW SCOBLE.	

1909,

12, May.

*The Shanghai Supreme Court has no jurisdiction under sec. 76, Merchant Shipping Act, 1894.*

This was an appeal from a decree of the Supreme Court for China and Korea at Shanghai. His Majesty's Consul-general at Shanghai filed two petitions against the Appellants. One of them stated that the Plaintiff as consular officer had seized and detained the ship under the Merchant

Shipping Act, for having used the British flag without authority to do so. The Supreme Court tried the petitions and in the result passed a decree declaring the forfeiture of the ship. Hence this appeal.

*Sir Robert Finlay, K. C., Mr. Scrutton, K. C., and Mr. H. Cowell* for the Appellants.

*The Attorney-General, the Solicitor-General and Mr. Rowlatt* for the respondent.

LORD MACNAGHTEN in delivering their Lordships' judgment in favour of the Appellants observed:—"It is contended for the present Appellants that sec. 76, Merchant Shipping Act, 1894, confers authority upon no Court excepting those within the dominions of the Crown, whereas the Court at Shanghai is not within British territory. That contention on the part of the Appellants, in their Lordships' opinion, must prevail, for the language of the section is express, and there appears to their Lordships to be no other statutory authority extending the jurisdiction under this section to the Shanghai Court."

*Appeal allowed.*

## CALCUTTA HIGH COURT.

**Recent decisions not yet reported.**

(The important cases to be fully reported hereafter.)

**CRIMINAL REVISIONAL JURISDICTION.** Before CASPERSZ and RYVES, JJ. CRIMINAL REVISION No. 277 OF 1909. BHAIKAB CHANDRA SHIKDAR, Petitioner *v.* PRASANNA KUMAR SHIKDAR AND OTHERS, Opposite Party. 21st May 1909.

*Criminal Procedure Code, sec. 203—Dismissal of complaint on Police report without giving reasons—Impropriety of.*

The Petitioner on the 2nd January, made a complaint against 26 persons charging them with offences under secs. 147, 150, 167, 221, 379, and 384, I. P. C. The Police was asked to report and on the submission of the Police report, the Magistrate relying upon the report and without making any further enquiry or giving his reasons, proceeded to dismiss the complaint under sec. 203, Cr. P. C. The Sessions Judge on application made to him declined to interfere. The complainant then obtained this Rule from the High Court.

Their Lordships observed:—

"We think that the Rule must be made absolute for the simple reason that no enquiry was made into the complaint which, among other offences mentioned the offence of extortion. The complainant says that he had to pay Rs. 20 to the Police, and this is a matter upon which the complainant is justly entitled to adduce evidence and to have some inquiry made. We do not say that, in the result, any processes will have to be issued

against any or all of the accused persons, but we certainly think the case is one in which it is most desirable that an enquiry should be made, and that if the Magistrate decides to dismiss the complaint, he will be at liberty to do so but he must state his reasons for so doing."

*Babu Boikunta Nath Das* for the Petitioner.

*Babu Gunada Charan Sen* for the Opposite Party.

B. C.

*Rule made absolute.*

**CRIMINAL REVISIONAL JURISDICTION.** Before CASPERSZ and RYVES, JJ. CRIMINAL REVISION No. 573 OF 1909. BHAGIRATH SAHA, Complainant *v.* DEBENDRA NATH SAHA, Accused, Petitioner. 17th June 1909.

*Defamation—Proof of intention, if necessary.*

The facts of the case are that the complainant once instituted in the Court of the Deputy Magistrate at Bashirhat, a case under sec. 506, I. P. C., against the accused, and at the trial, on being asked by the Court as to his defence, the accused stated that at some caste-feast one of the party of the accused made an imputation against complainant's daughter-in-law (*e.g.* she had eloped) and therefore the complainant falsely instituted this case. The Court however in that case convicted the accused and fined him Rs. 10. Immediately after the conclusion of the trial the accused came outside the Court premises and Dwijendra Babu, a local pleader who defended the accused in that case, on seeing him near a Banyan tree, where the pleader was seated, enquired of him the real origin of the dispute which had led to that sec. 506 case. In reply the accused stated the incident at the caste-feast as the origin of the dispute. This conversation took place under the Barh tree where some other people were present including the mukhtar of the complainant in the sec. 506 case overheard the conversation between the accused and his pleader. Thereupon the complainant again instituted this case of defamation against the accused stating that he has been injured in his reputation, on account of the imputation made against the character of his daughter-in-law. In the lower Court two questions of law were raised: *first*, the complainant being the father-in-law (his son being alive) cannot, by reason of sec. 198, Cr. P. C., institute the case of defamation; and *secondly*, the accused is protected under exception 9 of sec. 500, I. P. C. The learned Deputy Magistrate of Basirhat overruled both the legal objections and remarking that the probability was that he publicly repeated the defamatory statement in question, under cover of a casual inquiry by Dwijen Babu, not only without due care and caution, but also out of spite, and convicted the accused and sentenced him to pay a fine of Rs. 50.

Against this order the accused moved this



Hon'ble Court and their Lordships without going into the questions of law,

*Held*—That the statement made by the accused in answer to the question from his pleader did not amount to defamation as there was nothing to show that the accused made any imputation intending to injure the reputation of any person.

*Babus Sharat Chandra Roy Chowdhury and Charu Chandra Bhattacharya* for the Petitioner.

*Babu Hari Charan Sarkhel* for the Opposite Party.

*Rule made absolute.*

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J. and MOOKERJEE, J. LETTERS PATENT APPEAL No. 80 OF 1908. APPEAL FROM APPELLATE DECREE No. 662 OF 1907. *UDAY CHANDRA DAS BAIRAGI*, Plaintiff, Appellant *v.* *HARI DAS BAIRAGI*, Defendant, Respondent. 7th June 1909.

*Occupancy and non-occupancy holdings, if divisible—Severance of occupancy right from holding—Conflict of decisions.*

Appeal from the decision of Doss, J., reported at 12 C. W. N. 1086.

The Plaintiff brought this suit to recover possession of a piece of land which they alleged belonged to their maternal grandfather, Ram Das Bairagi. The Defendants contested the claim on the grounds (1) that the Plaintiffs were not the heirs. (2) Even if they were, the Defendants had a better title by virtue of a devise to them of the property in dispute. The interest of Ram Das Bairagi in the property was that of a ryot who had an occupancy right.

Their Lordships held that the plea advanced by the Defendants that the Plaintiffs were not the heirs was established. Otherwise their Lordships would have been glad to refer the following two points to a Full Bench:

(1) Whether a holding in respect of which there was a non-occupancy right was heritable or not, (2) whether an occupancy right may be severed from the tenancy right or whether as decided in *Girish Chandra v. Kedar Chandra*, (4 C. W. N. 569), such separation is under no circumstances possible except to the extent and in the manner indicated in sec. 22 of the Bengal Tenancy Act. On the first point, their Lordships were of opinion that "the authorities could not be regarded as satisfactory; or while on the one hand there is the decision of a Division Bench in *Karim Chowkidar v. Sunder Bewa*, (1 C. W. N. 89: s. c. I. L. R. 24 Cal. 207) to the effect that it is not heritable, on the other hand in *Mohunt Lukhan Narain Das v. Jainath Panday*, (11 C. W. N. 626: s. c. I. L. R. 34 Cal. 516), the point though apparently referred was left undecided inasmuch as two members of the Bench were of opinion that the holding was heritable, one was of

opinion that it was not, and two other members did not express any opinion except so far as the Bengal Tenancy Act was concerned."

N. G.

*Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before SHARFUD-DIN and RICHARDSON, JJ. APPEAL FROM APPELLATE DECREE No. 1269 OF 1906. *SHEIKH MAHOMMAD ABDUL AZIZ* and OTHERS, Defendants, Appellants *v.* *BAIJ NATA GOENKA*, Plaintiff and *TAJAMMUL HOSSAIN AND ANOTHER*, Defendants, 2nd and 3rd Party, Respondents. 29th May 1909.

*Act XI of 1859, secs. 6, 7 and 8—Act VII (B. C.) of 1868, sec. 8—Suit to set aside revenue sale—Certificate of sale.*

This was an appeal by the auction-purchaser at a revenue sale. The sale took place on the 24th August 1903 when the property was purchased by the Defendant No 1. The Plaintiff and the Defendant 2nd party were maliks of the shares sold. The Plaintiff alleged that he had paid his share of the Government revenue, that his co-sharers in collusion with the purchaser defaulted and caused the sale fraudulently, that notices under secs. 5, 6 and 7 of the Sale Law were not issued and served and that the price fetched at the sale was inadequate.

The Subordinate Judge dismissed the suit on the ground that the purchaser had obtained a sale certificate from the Collector, that this certificate was conclusive evidence that all notices required to be served or posted under Act XI of 1859 were duly served and posted and that the title of the purchaser who had obtained the certificate could not be impeached or affected by reason of any omission, informality or irregularity in the service or posting of any such notice.

On appeal to the District Judge, he set aside the sale. The auction-purchaser appealed to the High Court.

*Held*—That sec. 8 of Act VII of 1868 (B. C.) operated as a bar to the success of the suit.

*Sheorattan Singh v. Net Lal Sahu*, (I. L. R. 30 Cal. 1), followed.

*Bal Mookund Lall v. Firjudhan Roy* (I. L. R. 9 Cal. 271) and *Lala Mabarak Lal v. The Secretary of State for India in Council* (I. L. R. 31 Cal. 200), explained.

*Moulvi Mohammad Mustaffa Khan* for the Appellants.

*Babu Khetter Mohun Sen* for the Respondents.

A. T. M.

*Appeal decreed.*

**CIVIL APPELLATE JURISDICTION.** Before CHATTERJEE, JJ. APPEAL FROM APPELLATE DECREE NO. 281 OF 1907. BHAGABATI SWARNAKAR AND OTHERS, Plaintiffs, Appellants v. SAKHI BAISHNABI, Defendants Respondents. 8th June 1909.

*Transfer of Property Act (IV of 1882), sec. 44—Conveyance, execution of—Possession, delivery of—Admissibility in evidence.*

The suit out of which the appeal arose was for recovery of possession of certain land. The Plaintiffs' case was that the land belonged to them and that in 1303 they left the village and made it over to the Defendant in trust. The Defendant's case was that the Plaintiffs in 1300, executed an unregistered conveyance of the land for Rs. 60 in his favour. The Plaintiffs remained in actual possession of the land as under-tenants until 1303, when they relinquished the land to the Defendant. The suit was decreed by the Munsif, but on appeal it was dismissed. The Plaintiffs appealed to the High Court.

*Held*—The fact that a conveyance had been executed and consideration paid sometime before would not weaken the effect of delivery of possession.

That the unregistered conveyance might be used as evidence of intention of parties in transferring possession.

*Makhan Lal Pal v. Banku Behary Ghose* (I. L. R. 19 Cal. 623), explained.

*Gunga Narain Gope v. Kali Charan Gowla* (I. L. R. 22 Cal. 179), referred to.

*Babu Brojo Lal Chuckerbutty* for the Appellants.  
*Babu Provas Chunder Miller* for the Respondent.

A. T. M.

*Appeal dismissed.*

**CIVIL APPELLATE JURISDICTION.** Before JENKINS, C. J. and MOOKERJEE, J. L. P. APPEALS NOS. 25 TO 35 OF 1909. NAIMUDDIN SHAIKH AND OTHERS, Defendants, Appellants v. RAM RANGINI DAS, Plaintiff, Respondent. 17th June 1909.

*Bengal Tenancy Act (VIII of 1885) secs. 105, 109—Appeal on a question as to status of the tenant decided against him.*

Plaintiff made an application for settlement of rent under sec. 105 of the Bengal Tenancy Act. The Defendants were recorded as occupancy raiyats under sec. 102, but in the proceeding under sec. 105 they stated that their tenancies were created before the permanent settlement and that they were paying the same rent for the last 20 years and that they were tenure holders. The Settlement Officer gave a decree to the Plaintiff and decided the contentions of the Defendants against them. The special Judge on appeal upheld the

decrees of the Settlement Officer. On second appeals being preferred the appeals came on for hearing before Carnduff, J., sitting singly and the appeals were all dismissed on the ground that no appeals lay.

Appeals were then preferred under sec. 15 of the Letters Patent.

*Moulvi Syed Shamsul Huda* (with him *Moulvi Nuruddin Ahmea*) for the Appellants, contended that second appeals lie against the decision on matters other than that settling the rent.

*Babu Surendra Chandra Sen*, for the Respondent, argued that in these cases under sec. 105 of the Bengal Tenancy Act the Settlement Officer had no jurisdiction to decide the question raised by the Defendants and the rent ought to have been settled on the record as it was and as a matter of fact the record was maintained by the Settlement Officer, and no second appeals would lie.

*Held*—That no second appeals lay in these cases.

*Appeals dismissed.*

## Notification.

(Calcutta Gazette, 16th June 1909).

No. 1169 F.D.—The 14th June 1909.—In exercise of the power conferred by cl. (a) of sub-sec. (3) of sec. 3 of the Sonthal Parganas Settlement Reg. (III of 1872), the Lieutenant-Governor is pleased to declare that the Indian Limitation Act, 1908 (IX of 1908), shall be deemed to be in force in the Sonthal Parganas for the trial of suits referred to in sec. 10 of the Sonthal Parganas Justice Reg. 1893 (V of 1893).

No. 1170 F.D.—The 14th June 1909.—In exercise of the power conferred by cl. (c) of sub-sec. (3) of sec. 3 of the Sonthal Parganas Settlement Reg. (III of 1872), and with the previous sanction of the Governor-General in Council, the Lieutenant-Governor is pleased to declare that the following enactments shall cease to be in force in the Sonthal Parganas, namely:—

the Indian Limitation Act 1877 (XV of 1877);  
the Registration and Limitation Acts Amendment Act, 1879 (XII of 1879), sec. 108;  
so much of the Civil Procedure Code Amendment Act, 1888 (VII of 1888), as relates to Act XV of 1877, and  
the Indian Limitation Act and Civil Procedure Code Amendment Act, 1892 (VI of 1892).

No. 1171 F.D.—The 14th June 1901.—In exercise of the power conferred by cl. (b) of sub-sec. (3) of sec. 3 of the Sonthal Parganas Settlement Reg. (III of 1872), the Lieutenant-Governor is pleased to withdraw so much of Notification No. 506 D., dated the 25th May 1901, as declared the Indian Limitation Amendment Act, 1900 (XI of 1900), to be in force in the Sonthal Parganas.

# Calcutta Weekly Notes

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MONDAY, JUNE 28, 1909.

[No. 33]

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THE CONSTITUTION OF BENCHES AND DISTRIBUTION of business to take effect immediately after the disposal of the Full Bench References are as follows:—

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ORIGINAL SIDE.—Mr. Justice Harington and Mr. Justice Fletcher will sit singly.

AMONGST THE RECIPIENTS OF BIRTHDAY HONOURS we notice that Mr. Justice Ashutosh Mookerjee and the Hon'ble Dr. Rash Behari Ghosh have been made Companions of the Star of India.

THE CASE OF *Gopal Chandra Bhattacharjee v. The Secretary of State*, a report of which appeared at p. 619 of the current volume of our reports, deserves special notice. The Plaintiff was given a cheque on the Government Treasury for work done for the District Board. He presented the cheque to the District Treasury for payment. The head *mohurrir* of the Treasury received the cheque after it was passed by the accountant, took the Plaintiff's signature in a receipt book in anticipa-

tion of payment and told the Plaintiff to apply a little later to the *poddar* for the money. When accordingly the Plaintiff went to the *poddar* for payment, he was told that the money had been paid to somebody else who had represented himself to be the payee. It was found that this was false and that the *poddar* and the *mohurrir* misappropriated the money, the value of the cheque, by practising fraud upon the Plaintiff. The question was whether the Plaintiff was entitled to get the value of the cheque from the District Treasury on the ground that he was defrauded by its employees.

IN DECIDING THE QUESTION THEIR LORDSHIPS seemed to think that this was a question as to when the fraud of an agent would bind the principal and their Lordships proceeded to determine whether the fraud committed by the *poddar* and the *mohurrir* was committed in the course of their employment and for the benefit of the Treasury. Obviously when the *poddar* and the *mohurrir* misappropriated the value of the cheque for their own use, they could not be said to have committed the fraud for the Treasury's benefit and their Lordships therefore held that the Treasury was not liable and cited several authorities in support of their view. But if this were the law, the manager or cashier of a Bank could appropriate the cheques endorsed over to the Bank by its customers, and the Bank could disown liability on the ground that misappropriation was made contrary to the interest of the Bank. Would such a plea prevail before any Court of Law?

THE QUESTION, IN OUR OPINION, CANNOT BE regarded as one of mere agency. Like the Bank, the Treasury is a debtor to the payee of the cheque. When the customer endorsed over the cheque to the Bank, or when the payee of the Treasury-cheque made it over to the Treasury employees and signed the receipt book at their request but received no money for it, the Treasury like the Bank continued to be a debtor to the payee till the money was paid to him. If the Bank or Treasury employees misappropriated the money before it reached the payee's hands, it is the Bank's or the Treasury's money that the servants misappropriated and not the payee's. The payee had no concern with such misappropriation and

the fact of his having given a receipt in anticipation of payment does not discharge the Treasury. Nothing but actual payment of the amount for which receipt was given could discharge the Treasury.

IT WAS NOT SO VERY LONG AGO, THAT WE CRITICISED in these columns the opposition of the General Council of the Bar to the decentralization of the administration of justice in England (See, *ante*, p. clxxvi). We are therefore glad to find that public opinion and even legal opinion in England is distinctly growing in favour of the establishment of District Courts in the important business centres of England. This is precisely what we suggested as a substitute for the Circuit system which in spite of every effort at reform is now declared to be both obsolete and unsatisfactory. An influential deputation recently waited upon the Lord Chancellor and the Prime Minister. It urged that under the Circuit system, not only were a number of cases left undecided by the Judges at the end of the assizes but even of those that were disposed of, only the first few were properly heard and those that were heard towards the close of the assizes were simply hurried over. A similar protest was also recently made from Birmingham. People in the important cities in England are anxious to get a constant flow of justice instead of its present intermittent supply under the Circuit system.

WHEN A PROPOSAL WAS PUT FORWARD LAST YEAR to reintroduce the Circuit system amongst us it was urged in its favour that some ceremony similar to that with which assizes were opened in England was likely to increase the prestige of the High Court Judges amongst the people. But the prestige of the judges always depended on the quality of the justice that people obtained from them. Even in England where such ceremonies have a historic origin they are now being described as "mimic show." The system of District Courts in India is a source of great convenience to the people. With increased efficiency of the judges presiding over them, they would command greater confidence of the people.

#### CRIMINAL CASES OF 1908.

(Continued from p. ccxv.)

EVIDENCE OF WITNESSES UNDER SEC. 164.—The evidence of witnesses taken under sec. 164 should be accepted with great caution, as it is not always proper for the police to get such statements recorded in order to pin a witness down to them, especially when he is not entirely free from their influence (*Kali Singh v. King-Emperor*, 7 C. L. J. 246). This matter has been dealt with in several cases.

It was held improper for a police-officer to send a witness practically under custody in order to fix him to a particular statement, and that, when retracted, it should not be brought on the record under sec. 288, Cr. P. C., without proper inquiry (*Queen-Emress v. Fadub*, 27 Cal. 295). The Magistrate should not, in such a case, record the statement, unless assured that the attendance of the witnesses and their statements are voluntary (*King-Emperor v. Bhut*, 7 C. W. N. 345, 349; *Bajrangi v. Emperor*, 4 C. W. N. 49; *Queen-Emress v. Fadub*, supra, p. 300). A police-officer has no authority to produce witnesses not appearing voluntarily for examination, or before a Magistrate not having jurisdiction to try (*Emperor v. Nuri*, 29 Cal. 483).

ILLEGAL SEARCH BY POLICE.—Sec. 165 applies only to the police and not the Magistrate. A search may be made under the section though there is no proceeding pending in Court. It refers to searches for particular weapons required for the purpose of some subsequent inquiry in a Court, but not for arms generally. (*Clarke v. Brajendra*, 36 Cal. 433). A public functionary authorized by statute to make a search must, in exercising that authority, act within the limits of the statute itself (*Clarke v. Brajendra*, supra; *Narasinha v. Imam*, 27 Bom. 590, 595). If a subordinate officer makes a search without the order in writing required by cl. (3) he acts without authority, and the party who resists has the right of private defence (*Idu v. Emperor*, 6 C. L. J. 753). If a police-officer has no authority to investigate a case without the order of a Magistrate under sec. 155, he cannot make a search (*Bahabal v. Tarak*, 24 Cal. 691).

COMPLAINT.—[Who may complain]. Ordinarily any person aggrieved by an offence has the right to put the Court in motion (28 All. 554, 558; 3 Cal. 758, 761; 24 W. R. Cr. 22), and the right is a common right only limitable by legislation, and can be taken away only by express words or necessary implication (3 Cal. 758, 761), e.g., in the cases of certain offences against the State, or by or against public servants, the Court or public justice (28 All. 554, 558; 3 N. W. P. 194, 195; 9 W. R. Cr. 31). As a general rule any person having knowledge of the facts of an offence may complain though not personally interested or affected by it (13 Bom. 600; 21 Bom. 536, 538; 18 All. 465; 25 Bom. 152, 155; 24 W. R. Cr. 22; 13 Bom. 509 (F. B.); W. R. (1864) 33, 34; 7 All. 871, 875. Cf. 6 W. R. Cr. 3). The person on whom an attempt to cheat was made need not be the complainant himself (*Mahadev v. Dhonraj*, 12 C. W. N. 750, 751).

[Complaint against several]. Where a Subordinate Magistrate, to whom a case was transferred under sec. 192, "dismissed the case" under sec. 247, and acquitted the accused and terminated the case in his Court, held that the District Magistrate could not direct further proceedings till the order

was set aside by competent authority (*Panchu v. Umor*, 4 C. W. N. 346, followed in 7 C. W. N. 493, *Ibid* 711), nor where the trying Magistrate, after acquitting one accused, orders the case not to be further proceeded with against the surrendering accused and withdraws the warrants and proclamation against him (*Panchu Ghosh v. Khosdel*, 12 C. W. N. 60). The Subordinate Magistrate is competent, however, in acquitting or discharging some accused, to proceed against the rest if the evidence discloses an offence by them (*Re Azim*, 7 C. L. J. 249: *Panchu Ghosh v. Khosdel*, supra).

COGNIZANCE ON PERSONAL KNOWLEDGE.—A Subordinate Magistrate issuing process in a case put up before him by the Collector's order takes cognizance under sec. 190 (1) (c) (*Bansi v. Emberor*, 12 C. W. N. 438). A Magistrate taking cognizance under cl. (c) should record the information on which he has acted (*Thakur Pershad v. Emberor*, 10 C. W. N. 775: *Rash v. Emberor*, 35 Cal. 1976) and he is bound to disclose the information, private or otherwise, (*Re Mohesh*, 13 W. R. Cr. 1, approved of in 10 C. W. N. 775), but not the sources of the information (*Thakur v. Emberor*, supra: *Re Milhu*, 27 All. 172). [Transfer of appeal]. A Magistrate who took cognizance of a case under cl. (c) cannot hear an appeal on conviction in such a case. (*Bansi v. Emberor*, supra).

TRANSFER OF ANY CASE.—Sec. 192 (1) is not restricted to cases of offences only, but is wide enough to include cases under Chap. VIII (*Chintamon v. Emberor*, 35 Cal. 243: *Akbar v. Domi*, 4 C. W. N. 821), or under Chap. XII (22 Cal. 298: 2 C. L. J. 614: 31 Cal. 350: 10 C. W. N. 1095: but cf. 25 Bom. 179), and even if the power did not exist the irregularity would be cured by sec. 539 (b). [35 Cal. 243: 4 C. W. N. 821: 2 C. L. J. 614: 5 C. W. N. 686].

SANCTION.—[Application]. There is no authority in the Code to dismiss an application for sanction for default of the applicant: the Court is bound to dispose of it on its merits (*In re Gopal*, 32 Bom. 203).

[When necessary]. Where a person was charged under secs. 467 and 471, I. P. C., and sec. 82 of the Registration Act, and discharged, and a further inquiry was ordered, but before the commencement of the inquiry a Civil Court decided that the document in question in the criminal case was a forgery, it was held that sanction of the Civil Court was necessary. (*Giridhari v. Marwari*, 12 C. W. N. 822). When in the course of the commission of an offence, for the prosecution of which sanction is necessary, other offences, which may be separately charged under sec. 235 and for which no sanction is required, are committed, a complaint in respect of the latter is legal though sanction was refused for the former offence (*Krishna v. Krishna*, 31 Mad. 43). The same principle was laid down in *Queen-Empress v. Agant*, 25 Bom. 90, distinguishing 19

Bom. 51, and *Ibid* 340. So a public servant charged with acts which would amount to extortion, if committed by a private individual, may be prosecuted for such offence without sanction (*Reg. v. Farshram*, 7 Bom. H. C. R. 61). But this view is opposed to some dicta in *Re Nagarki*, 19 Bom. 349, 348, and *Queen-Empress v. Gundaya*, 13 Bom. 500, 502.

[Offence not in, or in relation to, a proceeding in Court]. Where a District Magistrate directed a prosecution under sec. 211, I. P. C., against the informant to the police, but not the abettor, the Sessions Judge has no power under sec. 195 to sanction the prosecution of the latter, nor can he act under sec. 176, in such a case (*Dharmadas v. Emperor*, 12 C. W. N. 575). So also it has been held that no sanction is required to prosecute for false information given to the police (14 Cal. 707, 715: 7 Mad. 292, 293: 3 C. W. N. 33: 26 Cal. 786: 33 Cal. 30, 32: 30 All. 52: 24 W. Cr. 41: 25 W. R. Cr. 33: 4 C. L. R. 413: 5 Cal. 184: 8 Cal. 435, 439: 3 All. 322), or false evidence or fabrication during a police investigation (11 Bom. 659: 4 Bom. 479: 26 Cal. 786), but sanction of the Court is required for abetment of subornation of perjury in a pending suit before the Court (*Chandra v. Balfour*, 26 Cal. 359).

E. H. MONNIER.

(To be continued.)

## Notes of Cases.

### CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before CASPERSZ and RYVES, JJ. CRIMINAL REVISION No. 193 OF 1907. MAFIZ MULLICK, Complainant v. SADAR JAMADAR AND OTHERS, Accused, Petitioners. 17th June 1909.

Criminal Procedure Code, secs. 195, 489—Sanction—Disqualification—Magistrate whose order disobeyed cannot try.

This was a rule on the District Magistrate of Mymensingh to show cause why the convictions of the Petitioners under sec. 188, I. P. C., should not be set aside on the grounds, (i) that there was no sanction obtained previous to the prosecution of the accused, and (ii) that the case was tried by the Magistrate whose order was disobeyed.

It appears that on the 4th of July 1908 the Petitioners were placed on their trial in the Court of Mr. Scott, Sub-divisional Magistrate of Tangail, under sec. 188, I. P. C., for a disobedience of an order passed by the said Court on the 20th of June 1908 under sec. 145, Cr. P. C., attaching an island char called Char Boira lying within the local

limits of the jurisdiction of that Court. On the 24th of August 1908, while the case was pending in the Court of Mr. Hossein, the Sub-Deputy Magistrate, to whom the case was made over for disposal, the complainant prayed to Mr. Scott for sanction to prosecute the Petitioners. On this petition the following order was recorded: "If the Court summons the accused sanction may be presumed." The case was subsequently withdrawn from the file of the Sub-Deputy Magistrate and tried by the Sub-divisional Officer himself. On the 30th of November 1908, the learned Sub-divisional Magistrate of Tangail convicted the Petitioners under sec. 188, I. P. C., and sentenced each of them to pay a fine of Rs. 20.

*Mr. Bhudeb Chunder Roy*, Vakil, in support of the rule contended (i) that the order passed by the Sub-divisional Magistrate on the 24th of August was no sanction, and (ii) that the Sub-divisional Magistrate was not competent to try the case, *vide sec. 487, Cr. P. C.*

No one appeared to show cause. The Magistrate had submitted an explanation.

*Held*—That the order of the Sub-divisional Magistrate saying that if the accused are summoned sanction may be presumed, did not amount to a sanction as required by law. That the trial of the Petitioner was in contravention of sec. 487, Cr. P. C., being held by the Magistrate whose order was disobeyed.

The convictions and sentences were set aside.

S. L.

*Rule made absolute.*

**CIVIL APPELLATE JURISDICTION.** Before SHARFUD-DIN and RICHARDSON, JJ. APPEAL FROM APPELLATE DECREE No. 339 of 1906. RAGHU NANDAN PANDE AND OTHERS, Appellants *v.* SHEQDOYAL PANDE AND OTHERS, Respondents. Heard, 27th May 1909. Judgment, 11th June.

*Limitation Act (XV of 1877), sec. 22, Sch. II, Art. II.*

The second appeal was preferred by the Plaintiff and the sole question was a question of limitation with reference to the provisions of sec. 22 of Act XV of 1877.

The suit was brought to set aside an order made under sec. 335 of the Civil Procedure Code (Act XIV of 1882), and the Subordinate Judge decided that by the joint operation of the section cited and Art. II of Schedule II of the Limitation Act, the suit was barred by limitation. The circumstances were thus stated in his judgment. "The original Plaintiffs, Sheo Proshad and Fateh Chand, instituted the suit on the 30th March 1904, *i.e.*, within one year from the date of the passing of the order under sec. 335, C. P. C. The original Plaintiffs, however, assigned their interest to Raghu

Nandan and others, and these latter were substituted for the original Plaintiffs on the 11th July 1904, *i.e.*, long after one year had elapsed from the date of the order, passed under sec. 335, C. P. C."

The Munsif attempted to evade the effect of the law of limitation. He said that though the original Plaintiffs had been struck off the record, they were nevertheless carrying on the suit in conjunction with the substituted Plaintiffs.

*Held*—That the new Plaintiffs were substituted on the record in the place of the original Plaintiffs and not merely added as Plaintiffs.

*Harak Chand v. Deo Nath Sahai* (I. L. R. 25 Cal. 409) followed.

*Babu Jages Chunder Dey* for the Appellants.  
None for the Respondents.

A. T. M.

*Appeal dismissed.*

**CIVIL APPELLATE JURISDICTION.** Before JENKINS, C. J. and MOOKERJEE, J. LETTERS PATENT APPEAL NO. 60 OF 1908. GOPAL CHANDRA DAS MADAK, (Special Appellant), Appellant *v.* THE CHAIRMAN OF SANTIPUR MUNICIPALITY, Respondent. 14th June 1909.

*Bengal Municipal Act, secs. 202, 220, 233—Abolicability of the Act.*

The Plaintiff had a house within the limits of the Municipal Town of Santipur which abutted on one of the public roads. In front of that house there was a platform which rested on the site of a part of that road, and on that theory the Municipality purporting to act under sec. 202 of the Bengal Municipal Act took action for the removal of the platform. The Plaintiff, therefore, commenced the suit for a permanent injunction. He succeeded before the Munsif. The Subordinate Judge, did not agree with the Munsif, and principally relying on sec. 233 of the Act as being the section by which the rights of the parties had to be determined, he varied the Munsif's decree. There was an appeal to the High Court, together with a cross-appeal, with the result that the suit was dismissed. The Plaintiff appealed under the Letters Patent.

*Held*—That sec. 202 of the Bengal Municipal Act could not apply, when it was held that the platform was in existence for at least fifty years. That sec. 233 could not have any application, for the procedure laid down in that section was not observed and that section could not apply to any Municipality, unless and until, it was expressly extended thereto by the local Government.

*Babu Baranashibasi Mukerjee* for the Appellant.

*Babus Nil Madhub Bose and Sarat Chandra Khan* for the Respondent.

A. T. M.

*Appeal allowed.*

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### REPORTS (See Index.)

*Comparative Legislation* for a sketch of the new Turkish constitution. The Turkish constitution opens with a declaration of the indivisibility of the Turkish empire. The constitutional party in Turkey did not at all desire that with the disappearance of the ancient regime the Empire should fall to pieces. The party of progress while aiming that diverse subjects of the empire would be welded into a new-born Turkish nationality by virtue of the constitution, determined at the same time to fight with all their might against the disintegration of the Empire.

THE THIRD CRIMINAL SESSIONS OF THE PRESENT year commences its sittings from date, Mr. Justice Carnduff presiding.

IT IS ANNOUNCED THAT MR. G. H. B. KENDRICK, LL. D., has been appointed Advocate-General of Bengal. He seems to be a comparatively junior member of the Bar. In a previous issue (see 13 C. W. N. p. clxxxv-clxxxvi) we pointed out the disadvantages and drawbacks of obtaining an Advocate-General from England who must be lacking in local experience which is of much greater importance to the proper discharge of his duties than even those of the Law Member of the Viceroy's Council. It is to be regretted that it furnishes another instance of the disregard by the authorities of public opinion and, what is perhaps no less lamentable, an unmerited slight to the local Bar. We note, however, that the new Advocate-General has written a Digest of Equity, is a Parliamentary draftsman and belongs to the Eastern Circuit and the Central Criminal Court and is only 42 years of age. Let us hope that after gaining Indian experience he will prove worthy of the charge and that in any event he will maintain the best traditions of the English Bar.

THE PEACEFUL REVOLUTION IN TURKEY WHICH has as if by the waving of a magic wand replaced a most despotic and autocratic personal rule by a highly constitutional form of Government is unprecedented in the history of the world. The achievements of the Young Turks can hardly be realized without knowing what great a charter this new constitution is of the rights and liberties of the Turkish subjects. We are indebted to the last number of the *Journal of the Society for*

AFTER SECURING THE INTEGRITY OF THE EMPIRE by the 1st article, the 2nd article proceeds to define the constitutional prerogatives of the sovereign almost on the same lines as those of the British sovereign. The sovereignty is declared to belong to the eldest Prince of the House of Osman. As the British sovereign is the head of the English Church and the protector of the Protestant faith so is the Sultan the supreme Caliph of Islamism and the protector of Musalman religion. He may no doubt summon and prorogue the General Assembly and dissolve the Chamber of Deputies but in case of dissolution he is bound to direct re-election within a limited period; he may also appoint and dismiss ministers; make war or peace; commute or pardon sentences passed by Criminal Courts. He administers the Sacred Law (*chéri*). Theoretically he is irresponsible and his person is sacred and his property and liberty is under the guarantee of the people. But the deposition of Sultan Abdul Hamid since the promulgation of the constitution establishes the supremacy of the constitution and makes the Turkish sovereign a constitutional sovereign in the strictest sense of the term.

THE NEXT AND SUBSEQUENT SECTIONS OF THE constitution deal with the public rights of the citizens. Art. 9 provides that all subjects of the empire are Ottomans, whatever faith they may profess. It is worthy of note that the object of the provision is to create a national feeling among the heterogeneous population of Turkey. The cause of order, peace and good Government can only be secured by the promotion of an equality of rights and liberties and a community of political interests in the empire. After defining the equality



of Turkish citizenship by Arts. 8 & 9, Art. 10 guarantees the personal liberty of every Turkish citizen by declaring that "every Ottoman enjoys personal liberty on condition of not interfering with the liberty of others, and this liberty is inviolable" and this is explained as meaning that an Ottoman may not suffer imprisonment except by due process of law. Art. 11, while declaring Islamism as the State religion, secures the free exercise of all faiths provided it is consistent with public order and morality and thus guarantees religious toleration throughout the empire. By Art. 12 the freedom of the press is granted within limits imposed by the law and these limits are explained as meaning presumably the limitations imposed by the law of libel.

ARTS. 13 AND 14 CONFER THE RIGHT OF FORMING companies for industrial development, of petitioning the authorities for maintaining law and order and also of complaining to the General Assembly against the conduct of Government officials. The right of petitioning forms one of the most valued rights of the British constitution. In countries under autocratic rule, the privilege of petitioning against the acts and conduct of persons in authority is seldom tolerated and a petitioner would more often be persecuted than obtain redress by petitioning. In all constitutional countries care is therefore taken to secure the right of petition by charter. Articles 15 secures the freedom of education. Arts. 17, 18 and 19 after declaring that all Ottomans are equal in the eye of the law, without prejudice to their religious beliefs, provides that they are all alike admissible to public offices according to their fitness, merit and ability, but a knowledge of the Turkish language is made a fundamental qualification. Thus the chief qualification for public service is neither birth, race or religion but merit; so also the basis of common nationality is language and not race, birth or religion.

ARTICLES 20, 24, 25, PROVIDE THAT TAXES ARE to be assessed in proportion to the fortunes of the tax-payers and that no taxes may be levied except by a law duly passed, prohibit confiscation of property or imposition of forced labour and make savings regarding measures that may be rendered necessary by exigencies of war. By Arts. 21, 22, 26, property lawfully acquired is guaranteed and they prohibit dispossession by the State except for good public cause shown and payment of fair compensation. The home is declared to be inviolable and it cannot be entered by the authorities except in cases prescribed by law. No one is bound to appear before any other than a lawfully constituted tribunal and torture and inquisition are wholly and absolutely forbidden. The constitution thus

provides a complete charter of liberty and the only noticeable gaps in it are that the rights of public meeting and trial by jury find no express mention in it. Events have moved rapidly in the Ottoman Empire since the introduction of the constitution and the party of progress has ultimately triumphed over the reactionary forces and it would be safe to predict that whatever shortcomings there may be in the constitution will be remedied under their enlightened guidance.

## CRIMINAL CASES OF 1908.

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SANCTION.—[Grounds of]. Sanction ought not to be granted unless there is a reasonable chance of conviction (*Kali v. Basudeo*, 12 C. W. N. 3). See also 26 *Mad.* 116: *Ibid* 193: 23 *Mad.* 210: 1 C. W. N. 400, 401: 22 *W. R. Cr.* 11: 6 *All.* 114: 18 *All.* 358, 360: 26 *All.* 1, 3: 19 *Bom.* 72, 80. Sanction to prosecute under sec. 211, I. P. C., should be granted only when the case is, deliberately false, and under sec. 196, when it is not false in substance but bolstered up by false evidence (*Bhola Nail v. Hari*, 7 C. L. J. 169).

[Powers of Superior Courts—Cl. (6)]. When a Court has dismissed an application for sanction for default of appearance of the applicant, the Appellate Court can only revise the order of dismissal but cannot grant sanction (*In re Gobal*, 32 *Bom.* 203). The application under sec. 195 (6) to a superior Court is by of appeal (*Raj Kumar v. Tincowri*, 12 C. W. N. 248 10 *Mad.* 232 (F. B.): *All.* W. N. (1884) 293: 26 *Mad.* 116, 117: 27 *Mad.* 223: 26 *All.* 244, 247, 248: 29 *Mad.* 132: 30 *Mad.* 382: 34 *Cal.* 551, 556: 32 *Bom.* 184, 192: 31 *All.* 48: 30 *All.* 243: contra 15 *All.* 61: 23 *Bom.* 50, 52), and no application for revision will be entertained until there has been an appeal [*All. W. N.* (1884) 293], and under sec. 421 of the Code the application ought not to be summarily rejected without a reasonable opportunity being given to the applicant of being heard (*Raj Kumar v. Tincowri*, supra). It has even been held in some cases that a second appeal lies to the High Court [30 *Mad.* 382 (F. B.), 27 *Mad.* 223: 11 C. W. N. 195: 5 C. L. J. 222 and see 10 C. W. N. 1026: 26 *Mad.* 139, 141 sed contra 30 *Mad.* 382, 384 per Wallis, J., 30 *All.* 243 and 31 *All.* 48]. The cases may be thus summarized: (1) An order by an Appellate Court, civil or criminal, granting a sanction refused by the first Court is appealable to the High Court (30 *Mad.* 382 approving of 27 *Mad.* 223: see 26 *Mad.* 139, 141: but contra 31 *All.* 48). (2) The revocation by such Appellate Court of a sanction granted by the first Court is a refusal of sanction and an appeal lies to the High Court. [30 *Mad.* 382 (dissenting from 10 C. W. N. 1026): 27 *Mad.* 223:

29 *Mad.* 122: contra 10 *C. W. N.* 1026]. (3) An order by an Appellate Court confirming a sanction granted is appealable [11 *C. W. N.* 195: 5 *C. L. J.* 222 (distinguishing 10 *C. W. N.* 1026): 30 *Mad.* 382: contra 31 *All.* 38, (referring to 28 *All.* 554, 557): 30 *All.* 243: 26 *Mad.* 139, 141: 27 *Mad.* 223, 227, 228]. (4) By parity of reasoning an order by an Appellate Court affirming the refusal of a sanction refused by the first Court would be similarly appealable. The case of 27 *Mad.* 223 which excludes an appeal in this case, is, to this extent, inconsistent with 30 *Mad.* 382 (F. B.). No doubt this view of a second appeal involves not only a second but even a third appeal, as in cases where the first Court was a Magistrate of the 2nd or 3rd class, and leaves little scope for the operation of sec. 439. It is submitted that the view of the Allahabad, and not of the Madras Full Bench and the Calcutta High Courts, is the correct one. Sec. 195 only allows one appeal, and the matter can only be dealt with thereafter by the High Court under sec. 439 on revision. Indeed, the Madras Court has held this to be so where the first Court was a second class Magistrate, and has denied a second appeal to the Sessions Judge (26 *Mad.* 137), which he would apparently have if 30 *Mad.* 382 is carried to its logical limits.

[Secs. 195 and 476]. On appeal from an order refusing sanction the District and Sessions Judge has power to act under sec. 476, but he should proceed himself to dispose of the matter and not direct the lower Court to prosecute (*In re Lakshmidas*, 32 *Bom.* 184), but this view is opposed to *Dharmadas v. Emperor*, 12 *C. W. N.* 575, and also 16 *All.* 80, 2 *C. L. J.* 612, 613 and 18 *Mad.* 487, 490).

COMPLAINT.—[Section 199]. There must be a formal complaint under sec. 199 in respect of the offence of which the accused is convicted. A conviction under sec. 498, I. P. C. on a complaint under sec. 497 is bad. (*Korap v. Hadi*, 12 *C. W. N.* cxvi: see also 5 *All.* 233: 29 *Cal.* 415: 30 *Cal.* 910 (F. B.): 27 *Mad.* 61).

COMMITMENT.—[Discharge on the evidence]. It is competent to a Magistrate to determine the credibility of evidence in a sessions case, and he should not commit if, notwithstanding the existence of direct evidence, the prosecution story is improbable and the evidence unreliable (*Rash Behari v. Emperor*, 12 *C. W. N.* 117). See also 5 *All.* 161: 6 *All.* 477: 21 *All.* 265: 7 *C. W. N.* 77, 457: 26 *All.* 564: 5 *C. W. N.* 110, 112: Cf. 19 *W. R. Cr.* 49: 5 *Bom. H. C. R.* 41. But an opposite view has been taken in other cases: 11 *Bom.* 372: 37 *Bom.* 84: (3 *N. W. P.* 27: 14 *W. R. Cr.* 16).

[Quashing commitment on facts]. Under sec. 215 a commitment can only be quashed on a point of law, but the fact that there is no evidence is a question of law, and a commitment based on no evidence can be set aside by the High Court (6 *All.*

98: 5 *C. W. N.* 411: 9 *C. W. N.* 829: 16 *W. R. Cr.* 74). Section 215 is limited to commitments under secs. 213, 214, 477 and 478 [31 *Cal.* 1: 27 *Mad.* 54], but not to those under sec. 436, in which case the High Court may quash it on the facts [*Rash Behari v. Emperor*, 12 *C. W. N.* 117: see also 7 *C. W. N.* 327: 27 *Mad.* 54: 30 *Mad.* 224], nor under sec. 526 (1), cl. (iv) [27 *Mad.* 54].

CHARGES.—[Omissions]. A charge of an offence under sec. 406, I. P. C., in respect of "some deeds" committed on the 21st June, when there were no deeds bearing that date, was set aside (*Bipra v. Niradmoni*, 12 *C. W. N.* 577, 578). So also where the charge stated the common object of the unlawful assembly to be to take "some property" unspecified, and its specification would have altered the whole complexion of the case, it was held to be a defect not curable under sec. 537 (*Poresh v. Emperor*, 33 *Cal.* 295).

[Secs. 233—236]. A joinder of charges in respect of three separate acts of misappropriation within a year, and of two separate acts of forgery to conceal two of former acts of misappropriation is an illegality not covered by sec. 537 (*Emperor v. Mata*, 30 *All.* 351). So a joinder of three offences under sec. 409, I. P. C., with three under sec. 477A is bad, though each of the acts under secs. 409 and 477A constituted one transaction (30 *Mad.* 328). In *Bepin v. Emperor*, 35 *Cal.* 161, two offences under sec. 178, I. P. C., committed on the 26th and 29th August, were joined with two offences under sec. 179, on the above dates, and the trial was held not to be in contravention of sec. 234. This view is opposed to 10 *C. W. N.* 53: 10 *C. W. N.* 520, and can only be justified on the ground that it fell under sec. 235, as Sharfuddin J. did put it. The Bombay High Court has recently held that secs. 234 and 236 are to be read cumulatively (*Re Bal Gangadhar*, 33 *Bom.* 221, approving of *Emperor v. Tribhovanadas*, *Ibid.* 77). This view is entirely novel.

[Secs. 237 and 238]. These sections would not apply to support a conviction under sec. 338, I. P. C., where on a charge under sec. 326, I. P. C., the jury brought in a verdict of "guilty but not voluntarily," and where there was no verdict under sec. 338 nor a finding of facts within that section (*Emperor v. Khudiram*, 12 *C. W. N.* 539).

[Misjoinder of persons]. The trial of cross cases together and dealing with them in one judgment is bad (*Kundro v. Emperor*, 12 *C. W. N.* cliii). Such misjoinder has always been held to be wrong (*B. L. R. Sub. F.* 750: 9 *W. R. Cr.* 33: 1 *N. W. P.* 293: 12 *W. R. Cr.* 75: 6 *Cal.* 96: 4 *Cal.* 358: 20 *Cal.* 537) though in some of the cases the error or irregularity was held to be cured by sec. 537, or its corresponding sections under the older Codes. But since the Privy Council decision in 25 *Mad.* 61, the misjoinder is fatal. Where, however, the cases are tried almost simultaneously but separately, the

trial is not vitiated. (8 C. W. N. 344). Where one accused was tried under secs. 224 and 342, I. P. C., and others under secs. 225 and 147, it was held that the transaction, as relating to the charge under sec. 342, was not the same in the case of all the accused, and that the trial was bad (*Fagnarain v. Emperor*, 12 C. W. N. xv).

B. H. MONNIER.

(To be continued.)

## Notes of Cases.

### CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

**CRIMINAL REVISIONAL JURISDICTION.** Before CASPERSZ and RYVES, JJ. CRIMINAL REVISION NO. 516 OF 1909. NIMAI MONDAL, Petitioner v. BISWANATH BANERJEE, Opposite Party. 17th June 1909.

*Transfer*—A Magistrate holding a preliminary inquiry against the accused whether should try the accused.

This Rule was obtained for the transfer of a criminal case which was pending against the Petitioner from the file of the Magistrate on the ground that the Magistrate had formed an adverse opinion against the Petitioner in the preliminary inquiry which he held.

Their Lordships observed :—

"The District Magistrate does not state that there is any other Magistrate in the District to whom the case may be made over for disposal. He says that the mere fact that a Magistrate has held a preliminary inquiry does not of course prevent him from trying the case himself and he refers to the case of *Anoda Charan Singh v. Basu Mundle*, I. L. R. 24 Cal. 167. In this case it does not appear that the Magistrate has expressed any thing more than a *prima facie* ground for going on with the case. We have no doubt that the Deputy Magistrate will try the case impartially."

*Babu Khetra Mohan Sen* for the Petitioner.

Rule discharged.

**CIVIL APPELLATE JURISDICTION.** Before COXE and CHATTERJEE, JJ. APPEAL FROM APPELLATE DECREE NO. 2334 OF 1907. KANURAM DEB AND ANOTHER, Defendants, Appellants v. KASHI CHANDRA SHARMA CHOWDHURY AND OTHERS, Plaintiffs, Respondents. 22nd June 1909.

*Hindu widow*—Sale of a portion to the next reversioner, if valid.

The disputed property was in the possession of one who held a Hindu daughter's estate in it. She sold the property to the then reversioner and on

the same day he executed an instrument in her favour which had the effect of giving her an absolute interest in the half of the property. The Plaintiffs Nos. 1 and 2 claimed partly as purchasers from the heirs of the reversioner and partly as purchasers from Plaintiff No. 3, the heir of the woman.

The Defendants were purchasers from the woman of a portion of the property in which she was said to have obtained an absolute interest by the deed of alienation executed in her favour by the reversioner. The Courts below gave the Plaintiffs, who sued for recovery of possession, a modified decree and the Defendants appealed to the High Court.

*Held*—A person holding a "woman's estate" may convey the whole or a portion of the property to a third person with the consent of the next reversioner; she can convey, as well as surrender the whole or portion of the estate to the next reversioner. The fact that the next reversioner may not be acting against his own interest in sanctioning the sale to himself does not take this particular case outside the general rule.

*Behari Lal v. Madho Lal*, (I. L. R. 19 Cal. 236), explained.

*Babu Brojo Lal Chuckerbutty* for the Appellant.

*Babu Harendra Nayan Mitra* for the Respondent.

A. T. M.

Appeal dismissed.

**CIVIL APPELLATE JURISDICTION.** Before CHITTY and CARNDUFF, JJ. APPEAL FROM ORIGINAL DECREE NO. 434 OF 1907. NORENDRA NATH BAIRAGI, Appellant v. DENO NATH DASS, Respondent. Heard, 17th June. Judgment, 18th June 1909.

*Adoption by prostitute, if valid*—Letters of administration, revocation of.

The Respondent obtained letters of Administration to the estate and effects of one Ramani Debi, widow of Chinta Moni Bairagi on the 5th January 1907. On the 6th March 1907, the Appellant applied to the District Judge for revocation of the letters of administration on the ground that the said Ramani Debi was a prostitute; that he was her adopted son and heir, and so entitled to administer her estate in preference to Deno Nath, who claimed to be her husband's brother's son. The District Judge rejected the Appellant's application. Narendra appealed to the High Court.

*Held*—Assuming that Ramani Debi was a prostitute, a Hindu woman cannot under any circumstance adopt a son to herself. Hence the applicant had no *locus standi*.

*Mr. J. Chatterjee* and *Babu Biswanath Bose* for the Appellant.

*Babus Mohendra Nath Roy* and *Surendra Nath Ghosal* for the Respondent.

A. T. M.

Appeal dismissed.

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### REPORTS (See Index.)

WE PUBLISH IN THIS ISSUE A REPORT OF HIS Lordship the Chief Justice's judgment in the Midnapur conspiracy case with our annotations and such notes of argument of counsel as would throw light on the many important questions of law and facts involved in the case. The masterly judgment in this case takes such a detailed and yet comprehensive view of all the material issues of fact and law that it leaves little scope for the editing of the judgment for the guidance of the profession. Having regard to the disclosures in this case we thought that the executive Government would set its mind at rest about the alleged conspiracy and turn their undivided attention to the raising of the moral tone of the Magistracy and the Police which in this country certainly stands at present at a very low level. But the prolonged official enquiry that is going on at Midnapur at the present moment and particularly its objects as explained by the Government of Bengal and admitted on behalf of the Secretary of State for India in the House of Commons has filled the public mind with a great deal of diffidence as to its propriety, especially, as it purports in some respects to go behind a judicial enquiry held by the highest tribunal in the land.

SOME OF THE HEADS OF ENQUIRY SUGGESTED BY Government are of very doubtful wisdom. For instance, it is said in the note of instructions to the enquiring officer that he is to ascertain whether "the case was at the bottom a genuine one." To depute an executive officer of Government to report on this question after the evidence of witnesses on oath on both sides and all the records of Sessions Court and Magisterial proceedings,

police papers and allegations affecting a large number of people and covering a wide area of time and space have been thoroughly scrutinized and adjudicated upon by the High Court of Calcutta, is not only unnecessary but also highly undesirable. The phrase "case at the bottom" is the favourite expression of the Mofussil executive magistrates known as "*asa hal*," rendered into English. They are always more anxious to ascertain the so-called "facts at the bottom" from the police their spies, informers and other similar disreputable class of people rather than from the records and sworn testimony in the case. This is why people have scanty faith in the administration of criminal justice by these executive magistrates. We are little surprised to find therefore that even when these raw magistrates develop into executive heads of administration their tendency of ignoring the evident and of probing "the case at the bottom" remains unabated. To this may be attributed the lack of public confidence in Government enquiry. Supposing the executive officer in charge of the enquiry declared after recording some haphazard statements that the "case at the bottom was true," what would the Government gain by it? Would any one in India accept it against the pronouncement of the Hon'ble the Chief Justice that the case at bottom seemed to be a police fabrication?

THE GOVERNMENT HAS NO EXCUSE FOR DIRECTING the enquiring officer to ascertain and declare from such materials as he may choose whether there was a conspiracy against Government or any officer thereof at Midnapur. Both the Government of Bengal and Mr. Hobhouse refer to the High Court judgment and seem to suggest that the Hon'ble the Chief Justice's judgment was limited to the case of the three Appellants and did not go into the question of general conspiracy. But it will appear from the report of the case we publish in this issue that the police story was that the three Appellants were the members of a group of 154 conspirators. Of these 27 were put on their trial but the prosecution had to withdraw their case against 24 because there was no evidence. In the High Court the Advocate-General on behalf of the Crown narrowed down the charge of conspiracy to the three Appellants but not without a struggle to implicate a number of people at Midnapur

and Calcutta (see *post*, p. 876, cl. 1). It has been found by the learned Chief Justice that against the remaining three there was no evidence of conspiracy except their own confessions extorted from them by the Police and the uncorroborated statement of a thoroughly discredited informer. His Lordship dismisses with little ceremony the Advocate-General's astuteness in tracing the germs of this conspiracy to the lease of a piece of land for a gymnasium (see p. 881, cl. 2). His Lordship also declares that from the anti-partition and swadeshi movements, "*Bande Mataram* processions and picketing operations" to this "very serious conspiracy is a far cry" (see p. 889, cl. 1). Finally their Lordships are inclined to suspect that it was not very unlikely that the police might after all be at the bottom of the bomb out of which this case of conspiracy was evolved. At any rate the High Court judgment is clear that the prosecution and the police had utterly failed to make out a case of either any general conspiracy or one of a more limited character.

AFTER SUCH UNEQUIVOCAL JUDICIAL FINDINGS IT IS hardly proper on the part of the executive Government to direct one of its officers to hold a non-judicial enquiry and pronounce his opinion as to the conspiracy. This head of enquiry therefore seems to us to be hardly respectful to the Calcutta High Court. As for the other "heads of enquiry" and the "instructions" accompanying them, we must say that they may be easily read as suggesting that the enquiring officer might, if he liked, whitewash the officers whose conduct has been adversely commented on by the Hon'ble the Chief Justice. We mean no reflection on the enquiring officer and we believe that he will overlook the leading character of the instructions submitted to him by Government and report fairly on the materials available to him. What we and the public strongly object to is the form of the instructions to the enquiring officer and the heads of enquiry. The Government would have been better advised if it had relied as to the facts of the case on the findings of the High Court. As for obtaining fuller information regarding the misconduct of the officers concerned the Government would have been failing in its duty if it did not hold the enquiry. But it has exceeded its duty in directing the enquiry to go behind the judicial decision of the final Court of Appeal.

THE FOLLOWING EXTRACT FROM THE *Law Times* regarding the questions put in Parliament regarding the Midnapur case will surely be found interesting. The Under-Secretary of State for India was asked a question on the 10th Inst. with reference to the tenure under which the judges of the High Court in India hold office, which is invested with an enhanced interest owing to the decision of the High Court in the Midnapur conspiracy case, quashing on appeal from the Midnapur

Sessions Court the convictions of three men in connection with the conspiracy, and visiting with severe strictures the methods of obtaining confessions adopted by the police as agents of the executive. Mr. Hobhouse, on behalf of Mr. Buchanan, the Under-Secretary, in reply to the query whether the Judges of the High Court of India hold office during good behaviour or at the pleasure of the executive, and what are the safeguards for the security of their freedom from the influence and control of the executive Government, said:—"The Judges of the High Court, who are appointed by His Majesty, hold office during His Majesty's pleasure: (24 & 25 Vict. c. 104, sec. 4). The local executive Government in India has no control or influence over them in the discharge of their duties." There is, however, the following curious proviso in the section of the Act declaring the tenure of these Judges to be at the pleasure of the Sovereign, or, in other words, at the pleasure of the Imperial Cabinet, which is calculated to bring them into direct relationship with the local executive Government in India: "Provided that it shall be lawful for every Judge of a High Court to resign such office of Judge to the Governor-General of India in Council or Governor in Council of the Presidency in which such Court is established." The Judges of the High Court in India are accordingly removable at the pleasure of the Crown. Lord Brougham lamented the holding of judicial offices in the colonies without responsible Government, as in India, at pleasure. "This," he wrote in 1863, "is understood to be absolutely necessary to prevent dangerous differences between the Government and the Bench": (Brougham's British Constitution, p. 316).

WE ALSO INVITE ATTENTION TO THE FOLLOWING further questions and answers in the House of Commons on the same subject.

Sir H. Cotton asked whether the official instructions to the Commissioner directed not only a full investigation into the conduct of all those concerned in the prosecution but also an inquiry into everything likely to throw light on the existence of a conspiracy against Government and on the persons involved, whether recently tried or not, and whether the Government accepted the judgment of the Chief Justice as showing that no conspiracy existed.

MR. HOBHOUSE.—The instructions issued by the Lieutenant-Governor include a clause in the sense stated. When the hon. member put his question on paper, he could not, I believe, have seen the judgment of the High Court. Now that he has seen it, he is aware that the question which it decided was not whether a conspiracy existed but whether certain Appellants were or were not proved to be guilty of a conspiracy against the Government of India. Of course, we are bound to accept the finding of the Court as final and conclusive in respect of those Appellants.

Sir H. Cotton.—Am I to understand then that the principal object of the enquiry is to ascertain whether a conspiracy existed?

MR. HOBHOUSE.—Yes, that is so, amongst other objects.

Mr. Hobhouse may have seen the judgment but we doubt from his interpretation of it whether he has read it through.

#### BEQUESTS TO UNBORN PERSONS IN HINDU LAW.

On the analogy of the Hindu law of gift which forbids a gift to an unborn person, it was held by the Privy Council in *Tagore v. Tagore* (9 B. L. R. 377) that a gift to an unborn person is void. In the case of *Soorjameny Dassee v. Deenobundo Mullick* (9 M. I. A. 135) it was laid down that if a prior absolute estate is made

defeasible on the happening of a subsequent event, such event must happen at the close of a life in being at the time of gift. It was suggested in a late case that this was the only limitation in the case of contingent or executory bequests and that this being satisfied a person unborn at the date of the testator's death but born before the close of a life in being at such date might take under the Will. This point was however settled by the Privy Council and the law as laid down in the *Tagore* case and the *Mullick* case was explained in the following terms: "In stating the rule relating to the defeasance of a prior absolute interest by a subsequent event, it is important to add that the event must happen, if at all, at the close of a life in being at the time of the gift as laid down in the *Mullick* case, and, secondly, that a defeasance by way of gift over must be in favour of somebody in existence at the time of the gift as laid down in the *Tagore* case." *Bissonath Chunder v. Bama Sundery* (12 M. L. A. 41).

In all these cases the bequests were prior to the coming into operation of the Hindu Wills Act of 1870. We have now to examine whether in the light of this Act the general proposition can be upheld that in no case can a gift be made to a person unborn at the death of the testator. Looking at the Act, we see that secs. 99, 100, 101 of the Succession Act made applicable to Hindus, contemplate a valid bequest to a person unborn at the date of the testator's death. The effect of these sections on the Hindu law of Wills came under the consideration of the Calcutta High Court in the Original Side in the case of *Alangamunjari v. Sonamoni* (I. L. R. 8 Cal. 137); Wilson, J., held that the Hindu Wills Act had changed the law and that under sec. 99 of the Succession Act made applicable to the Hindus a bequest may be made to unborn persons provided that the vesting of the estate is deferred to some later date and the devisee is born before such date. On appeal Garth, C. J., and White, J., overruled the decision and held that the Hindu Wills Act did not make any change in the substantive law relating to the power to create interests in property (I. L. R. 8 Cal. 637).

In arriving at this decision their Lordships were guided by the consideration that from the preamble and from sec. 3 of the Hindu Wills Act it appeared that no change in the substantive power relating to Wills was contemplated by the Act. The preamble says "Whereas it is expedient to provide rules for the execution, attestation, revocation, revival, interpretation and probate of Wills of Hindus, &c., &c." and in sec. 3 occurs the proviso "that nothing herein contained shall authorise any Hindu, &c., to create in property any interest which he could not have created before the first day of September

1870." It was observed from this that no change in law relating to the power to create any interest in property by Will was contemplated by the Hindu Wills Act and, that, as White, J., pointed out, 'interest' includes the question of the extent or duration of the estate given as well as the capacity of the donee to take. So, their Lordships held that under the Hindu Wills Act no one could take under a bequest who have could not have taken before the coming into operation of the Act and that therefore an unborn person could not take on subsequent birth in any case. Pontifex, J., in a contemporaneous case discussing the legality of the decision of Wilson, J., in this case observed that all sections of the Succession Act must be read as subject to the provisos in sec. 3. But as White, J., points out, the result of such interpretation would be to render nugatory the proviso of sec. 99 and secs. 100 and 101 which all contemplate bequests to unborn persons.

In this connection their Lordships had to consider the effect of the rule laid down in *Reg. v. Bishop of Oxford* (L. R. 4 Q. B. D. 245), which provided that a statute should, if possible, be so interpreted as not to make any part of it nugatory. This rule, their Lordships observed, could not be applied to a Statute like the Hindu Wills Act, evidently suggesting that the Legislature in making certain sections of the Succession Act applicable *en bloc* to Hindus did not sufficiently consider the effect of particular sections upon the substantive law of Wills which it was not meant to change.

If this decision is to be accepted as good law, then it must be held that a bequest to an unborn person is void in any case. And it must be admitted that this decision has not yet been directly overruled. The decision of the Privy Council however in the later case of *Narendra v. Kamalbasini* (I. L. R. 23 Cal. 563), in which the broader issue of the extent of the applicability of the Hindu Wills Act was raised, would throw a great deal of doubt on this decision, as by refuting the *ratio decidendi* in *Alangamunjari's* case it seems to overrule that decision by implication. This case was under sec. 111 of the Indian Succession Act. The Will here had created an absolute interest defeasible on the happening of a specified uncertain event which did happen, not at the death of the testator as contemplated by sec. 111, but at the close of a life in being at the death of the testator as contemplated by *Soorjamoney Dasse's* case. The contention was that the Hindu Wills Act had not made any change in the law and that the principle of the *Mullick* case about the validity of such bequest was applicable in this case. Their Lordships of the Judicial Committee however overruled the contention and held that the law had been changed by the Hindu Wills Act, that the Succession Act had laid down a hard and fast rule about contingent and executory bequests

which must be strictly adhered to. With reference to the applicability of the Hindu Wills Act the Privy Council quoted with approval the dictum of Lord Herschell in *Bank of England v. Vagliano* (1891, A. C. 107). "I think the proper course is in the first instance to examine the language of the Statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law and not to start with enquiring how the law previously stood and then, assuming that it was probably intended to leave it unaltered to see if the words of the enactment would bear an interpretation in conformity with the view. If a Statute intended to embody in a Code a particular branch of law is to be treated in this fashion, it appears to us, its utility will be almost entirely destroyed and the very object which it was enacted would be frustrated. The purpose of such a Statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of prior decisions."

This language applies with remarkable truth to the course followed by the Calcutta High Court in *Alangamanjari's* case.

So from the decision in *Narendia v. Kamalbasini*, we get that the Hindu Wills Act did change the law in spite of the preamble and that when any matter falls under its provisions the law relating to it must be found not in previous decisions but in the words of the Statute according to their natural meaning.

Now the Statute clearly lays down that bequests may be validly made to persons unborn at the death of the testator under certain specified circumstances. This then should have full force, unless there is something repugnant to it in the Act itself.

This brings us to consider the effect of the preamble and the provisos in sec. 3. So far as the preamble is concerned, it is settled law that although, where the meaning of any provision of the Statute is not clear, it has to be interpreted in the light of the preamble yet the preamble cannot expand or restrict the natural import of any clear provision of law [see Maxwell, Interpretation of Statutes, p. 66 (4th Ed.)], so also the Privy Council in *Kamalbasini's* case has enforced a provision of the Act in spite of the preamble.

It is quite true as Pontifex, J., remarks in the case of *Cally Nauth Naugh v. Chunder Nauth Naugh* (10 C. L. R., p. 207 : s. c. I. L. R. 8 Cal.) that the provisions of the Act have all to be read as subject to the provisos in sec. 3. But the question is whether the provisos contemplate the invalidity of a gift to a person unborn at the death of the testator, whether in fact, 'the creation, of an

interest in property' has reference to 'the capacity of the devisee to take' as held by White, J. To interpret that it has is to render nugatory secs. 100 and 101 as well as the proviso to sec. 99. Following the rule, in the *Bishop of Oxford's* case the interpretation that interest does not include capacity of the donee to take would seem to be preferable.

The section provides that the testator shall not have the power to create an interest in property which he could not have created before. This has reference, in its natural meaning, to the extent and nature of the interest. Now in the case contemplated by sec. 99, for instance, it is not doubted that a testator could have created the estate by gift over in favour of a person who was born before his death. Suppose he makes such a bequest in favour of the sons of A to take after the death of B. Now it would be a perfectly valid bequest so far as the testator is concerned. The birth of an issue to A or failure of such issue is a fact which may or may not defeat such bequest but does not affect the testator's competency to bequeath.

Unless we regard the word 'interest' as not including the capacity of the devisee to take we should have to suppose that the legislature intended these sections of the Succession Act, expressly made applicable to Hindus, to be altogether nugatory. Not only are we not justified in imputing such intention, but on the contrary in sec. 6 of the Hindu Wills Act these sections by number are contemplated as applying to Hindus. "And in applying secs. . . . 99, 100; 101 . . . of the said Succession Act to Wills and codicils made under this Act, &c." Fair presumptions as to the intention of the legislature may be justifiable but we cannot presume any intention directly contrary to the express provision of the Statute. It is difficult therefore to see how the legislature can by any means be said to intend that these sections should not apply to Hindus.

Perhaps a great deal of difficulty in properly disposing of this question was caused by the apprehension lest the immutable Hindu Law be altered by this decision. But about this, two things ought to be quite clear, viz., (1), that there is no Hindu Law of Wills and (2), that there is no provision in any authoritative work which lays down generally that a gift to an unborn person may not be made.

With reference to the first point I need only point out that not only is there no Hindu Law of Wills, but Wills are opposed to the principles of Hindu law. According to Hindu law the rights of a person are extinguished at death and the estate passes on to heirs or survivors as the case may be. The law of Wills which contemplates the personality of the testator to be artificially extended till the distribution of the assets and represented in the person of the executor, is



therefore quite foreign to Hindu law. That being so, if it is contended that the Hindu law of gifts is made applicable to Wills by contemplating an artificial extension of the personality of the testator, there is no reason why it should not be extended to the time when the will of the testator is exhausted, that is, in the case contemplated by sec. 99 to the period to which the vesting of the interest is deferred. If this is done, there is no bar to a person born after the testator's death but before that date to take under the Will.

Rules like the one making bequests to persons not in existence invalid are based on the principle that if they were to be regarded as valid there would be no finality in execution proceedings. It would be inconvenient if when the Will has been fully executed and the assets distributed, a new legatee or devisee should be born and lead to a total re-distribution of the entire assets. Such an objection does not exist to the application of secs. 99 to 101 of the Succession Act as by it no estates vested in possession would in any case be disturbed.

With reference to the second point it may be pointed out that the general rule is laid down in Jagannātha's Digest but in no one of the authoritative *smritis* or *tribandhas*. Still, it may be said that generally speaking a gift to an unborn person must be void. For, as the Dayabhaga points out, gift consists in the renunciation of one's title in favour of another sentient being. Now by this act of gift the title of the donor is extinguished. So the renunciation must of necessity be in favour of somebody in whom the property may vest. Since the very act of gift destroys the donor's title, it must vest in somebody immediately, as the estate cannot remain in abeyance. The donee must therefore be in existence at the date of gift.

The application of this general rule to Wills is unreasonable; for in laying it down the Hindu law-givers did not contemplate a gift deferred beyond the time of the expression of the Will to give; still less did they contemplate the extension of the personality of the donor beyond death as contemplated by the law of Wills. If the application of the law of gifts to that of Wills is by way of mere analogy, the analogy may be pressed too far. If it is based upon a fictitious extension of the personality of the donor, not only must the offer to give be regarded as open and capable of taking effect by vesting in somebody up to the date of the donor's natural death but up to the cessation of the donor's personality as extended in the person of the executor. Otherwise it might very well be contended that to take under a Will the legatee or devisee must be in existence at the date of the execution of the Will and that so soon as the Will is executed the legacies and devises vest in the donees and cannot

be defeated by any later event. A Will would thus be as irrevocable as a gift.

We find then that Wills are a creation of English laws and must be administered according to British Indian laws without any reference to false analogies to Hindu law. That being so, the provisions of Statute law must be given full effect to. And upon an examination of the Hindu Wills Act which is of paramount authority in the matter of Wills, we find that a bequest to unborn persons may be made under certain circumstances.

## CRIMINAL CASES OF 1908.

(Continued from p. ccxxvi).

**TRIALS.**—[*Cessation of proceedings after Civil Court decision*].—A Criminal Court ought to refrain from proceeding further with a trial for perjury when the Civil Court has on appeal believed the accused's statements, and a copy of the judgment is filed before the Magistrate (*Kanullah v. Emberror*, 12 C. W. N. 1). The abstract principle is no doubt sound, but the Code does not warrant cessation of proceedings in such a case. The better course to adopt would be to refer the case to the High Court under sec. 438.

[*Charge*]. On a charge of criminal breach of trust in respect of a deed, a conviction of that offence in respect of money obtained by dealing with the deed is bad (*Bibra v. Niradamoni*, 12 C. W. N. 577).

[*Discharge, effect of*]. It is competent to a Magistrate who has discharged the accused under sec. 253 to revive the case without an order under sec. 437. The rule of *autrefois acquit* does not apply to an order of discharge (*Emberor v. Maheswara*, 31 Mad. 543). This is, however, opposed to the view of the majority of the Full Bench in *Emberor v. Chinna*, 29 Mad. 126. It has now been held in several rulings that a case may be re-heard by a Magistrate, Provincial or Presidency, without an order of a superior Court, whether the complaint is dismissed under sec. 203. [*Jyotindra v. Hem*, 36 Cal. 415: see also 29 Mad. 126 (F. B.): 9 All. 85: 29 All. 7: All. W. N. (1895), p. 86], or the accused discharged under sec. 253. [29 Cal. 726 (F. B.): 28 Cal. 652 (F. B.): 8 C. W. N. 456, 458: *Emberor v. Maheswara*, 31 Mad. 543: 9 All. 52, 58] or under sec. 259 (28 Cal. 102: *In re Rudra*, 18 Mad. L. J. 561), which is, however, contrary to the opinion of the majority in 29 Mad. 126 (F. B.).

[*Plea*]. Where the accused does not formally plead guilty but throws himself on the mercy of the Court, the fact ought not to be held to prejudice him (*D. L. R. v. Ubenda*, 12 C. W. N. 140).

[*Right of cross-examination after charge*]. The accused has an absolute right to re-call and cross-examine the accused under sec. 256 after the charge is framed. (*Gopal v. Emberror*, 7 C. L. J. 240: see

also 27 Cal. 370, 372: 4 C. W. N. 351: 6 C. W. N. 424; 2 C. L. J. 17n), notwithstanding that he has cross-examined the prosecution witnesses before the charge (27 Cal. 370, 372), and the right cannot be made contingent on his depositing costs of the witnesses and the order for costs is illegal (4 C. W. N. 351: 2 C. L. J. 71n), though, when the accused cross-examined before the charge on the distinct understanding that he would not require the witnesses thereafter, he may be allowed to pay costs, which he offered to do (6 C. W. N. 424). Each accused has such right of cross-examination (11 C. W. N. cxl). It is only after the accused has entered on his defence that a Magistrate has discretion under sec. 257 (27 Cal. 370, 372: see 4 C. W. N. 351). But this discretion is limited to the circumstances specified in that section. He is bound to allow cross-examination under sec. 257 unless he considers the application to be made for purposes of vexation and delay or to defeat the ends of justice, and such grounds must be recorded, and the refusal of the Magistrate is not covered by sec. 537 but is fatal (26 Bom. 418 followed in *Narayan v. Emperor*, 31 Mad. 131: see 26 All. 536). Even if the prosecution witnesses are summoned by the accused as his own he is entitled to cross-examine them (28 Cal. 549 followed in 11 C. W. N. ccciii).

[*Process and attendance of witnesses*]. If a Magistrate has once issued process he is bound to enforce the attendance of the witnesses summoned (*Rohimuddi v. Emperor*, 35 Cal. 1093: see also 10 Cal. 931: 6 C. W. N. 548: 9 C. W. N. cccxix: 10 C. W. N. vii: 4 All. 53: 5 Mad. H. C. R. Ap. 27); even in a summons case (30 Cal. 121), unless the application for further process is for vexation or delay or to defeat the ends of justice (10 C. W. N. vii).

**MISDIRECTION.**—The omission to lay specifically before the jury in a charge under sec. 304, I. P. C., the questions of intention and knowledge, though the Judge had in the earlier part of the charge explained the definitions of "murder" and "culpable homicide," is a material misdirection. So also the omission to ask them to consider the plea of *alibi* and misrepresentation as to the effect of medical evidence (*Natabar v. Emperor*, 35 Cal. 531).

[*Opinion of Judge*]. It is a misdirection for the Judge to express his opinion on the facts without telling the jury that they are the sole judges of fact and are not bound by his opinion thereon (*Natabar v. Emperor*, supra). This has been well established in a large series of cases under all the Codes: (1 *W. R. Cr. 26*: 3 *W. R. Cr. L. 4*: 9 *W. R. Cr. 51*: 10 *W. R. Cr. 7*: *W. R. (1864)*, p. 5: 19 *W. R. Cr. 71*: 10 C. W. N. 153: 34 Cal. 698: 10 Cal. 970: 45 Cal. 230: 4 C. W. N. 196: *Ibid* 576). A charge on the facts which dictates to the jury the Judge's view, or leaves them no

loop-hole for any other view, is bad (19 *W. R. Cr. 71*: 14 All. 25: 20 Bom. 215, 224, 225: 26 Mad. 467: 10 C. W. N. lix). It is a misdirection to tell the jury that there is not sufficient evidence to establish the plea of the accused (20 Bom. 215, 224, 225: 7 C. L. J. 246).

[*Confessions and statements*]. It is a misdirection to ask the jury to consider confessions made to the police by the accused against another which were not the immediate cause of discovery of stolen property, or statements recorded under sec. 164 but retracted before the committing Magistrate and the Sessions Court (*Sankappa v. Emperor*, 31 Mad. 127).

**TRIAL OF APPROVERS.**—[*Revocation of pardon*]. An approver who shows an inclination to resile ought not to be put back in the dock without being examined as a witness. He should be examined as a witness under sec. 337 (2) and then dealt with under sec. 339. He should be tried separately after the trial of the other accused (*Arunachellam v. Emperor*, 31 Mad. 272: see also 24 Mad. 321: 27 Cal. 137 138: 23 Bom. 493). His trial simultaneously with the accused, when he forfeits his pardon in the Sessions Court is bad (14 *W. R. Cr. 10*: 14 *W. R. Cr. 43*: 7 C. L. R. 66: 14 All. 502: 15 Mad. 352: 22 Cal. 50: 20 All. 529, 532).

**ADJOURNMENT.**—A postponement of a trial by the Sessions Judge should be allowed to enable the accused to prepare his defence, though he delayed to take copies of the evidence of the witnesses before the Magistrate (*Haidar v. King-Emperor*, 12 C. W. N. cxlii).

E. H. MONNIER.

(To be continued.)

## Notes of Cases.

### ENGLISH LAW COURTS.

**KING'S BENCH DIVISION.**—*Rex v. Dibdin* (ex parte *Thompson*). Before MESSRS. JUSTICES DAWLING, BRAY and LAWRENCE. 18th May 1909.

*Can a clergyman refuse Holy Communion to persons married under the Deceased Wife's Sister Marriage Act, 1907—Statute Law and law of God.*

A rule nisi had been obtained by Canon Thompson calling on the Principal of the Archdeacon Court of Canterbury to show cause why a writ should not issue prohibiting that Court from proceeding with a decree against Canon Thompson. The question raised was whether Holy Communion can, since the passing of the Deceased Wife's Sister Marriage Act, 1907, be refused to persons who have contracted such a marriage. The facts of the case were as follows:—Mr. Banister was married on August 12, 1907, in Montreal, Canada, to his present wife. That marriage, though valid according to the law of Canada, was invalid here in England (for the Banisters were of English domi-

cile); but on August 28, 1907, their marriage became valid here as a civil contract under the aforesaid Act. Subsequently Canon Thompson refused Holy Communion to Mr. and Mrs. Banister on the ground that "you knowingly and wilfully contracted a union which was declared unlawful both by the church and by the law of the land."

The Court of Arches passed a decree admonishing Canon Thompson to abstain in the future from denying the Holy Sacrament to Mr. or Mrs. Banister. Hence this rule.

MR. JUSTICE DARLING in the course of his judgment observed as follows:—

Now, to judge of the legality of Canon Thompson's, or, rather, his Bishop's refusal of the Communion to Mr. and Mrs. Banister, reference must be had to the rubric. This has the force of statute law (see the Act of Uniformity, 13 and 14 Charles II, cl. 4, sec. 2). I shall assume, therefore, that before the Act of 1907 persons in the situation of Mr. and Mrs. Banister might properly have been repelled from Communion, but I do not affect to decide this, because of the forcible reasoning of the Dean of Arches in his judgment. It remains to consider whether the Statute of 1907 had affected this position. Now, it is plain that before August 28, 1907, such a marriage as that here in question was bad, as being against both the statute law and the law of God as declared by statute, and it is worth remarking that this complex condition is exactly that alleged by Canon Thompson in his letter as his justification. Such a marriage is, however, now valid by statute "as a civil contract." True, the statute which makes it so does not in term declare the marriage according to the law of God—but neither does it say the contrary. For my part I am of opinion that this marriage, which before was contrary to the law of God merely because the statute condemned it as such, is so no longer—and that by virtue of the statute which legalizes it. For, otherwise, we should have here a declaration that statutes recognize a certain contract as continuing contrary to the law of God, and do yet enact that it shall be good by the law of England.

If it be thought my view does not take due account of the Canons and of the Levitical rules, nor of that "law of God" to which appeal is so often made, I can only reply that the canons, and likewise the Levitical rules, have in England, since the Reformation, no authority but such as they may derive from the statute law.

For the considerations I have already set forth I come to the conclusion that Parliament did not intend to allow the curate to repel from Communion in the church of their parish, where they might even have been married, persons who had availed themselves of the Act of Parliament; not intending, on the other hand, to allow priests of the English Church to be penalized or censured for

solemnizing or permitting such marriages, nor, equally, for refusing their aid in that respect.

MR. JUSTICE LAWRENCE took the same view as Mr. Justice Darling.

MR. JUSTICE BRAY delivered a dissenting judgment. He held that Canon Thompson was protected by the first proviso of sec. 1 of the Deceased Wife's Sister Marriage Act, 1907, because the repulsion would have been justifiable before the passing of the Act. He remarked:—

If the clergyman refuse, persons marrying under the provisions of this Act will have to be married elsewhere. Why should it not have been intended that if the clergyman refuses to administer the Holy Communion to them they must go elsewhere? Both are no doubt hardships, but they result from the Act merely altering the civil status of such persons and giving protection to the clergyman's conscience. Now the case rests thus. The words of the proviso are in themselves precise and unambiguous. They apply in their ordinary interpretation to anything done or omitted to be done by the clergyman in the performance of the duties of his office. The rule applicable to the construction of statutes, as laid down in the "Sussex Peerage Case" 11 Cl. and Fin. 5) by all the Judges and approved by the learned Lords, was that they should be construed according to the intent of Parliament which passed the Act. If the words of the statute are of themselves precise and unambiguous then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves, in such case best declare the intention of the Legislature. Is there any sufficient reason here for departing from that rule of construction and inserting words which are not to be found in the Act? The only ground for so departing is, using the words of Mr. Justice Grove in *Richards v. McBride*, that "he must advance something which clearly shows that the grammatical contention would be repugnant to the intention of the Act and lead to some manifest absurdity." I have been unable to see the manifest absurdity which the Dean of the Arches was able to see.

The Attorney-General (Sir W. Robson, K. C.) and Mr. Rowlatt showed cause.

Mr. Duke, K. C., Mr. P. V. Smith and Mr. Hansell supported the rule.

Mr. Danckwerts, K. C., and Mr. F. E. Smith and Mr. Francly for Mr. and Mrs. Banister.

B. D.

Rule discharged.

## CALCUTTA HIGH COURT.

## Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

**CRIMINAL REVISIONAL JURISDICTION.** Before CASPERSZ and RYVES, JJ. CRIMINAL REVISION NO. 482 OF 1909. PURNA CHANDRA NANDAN, Petitioner v. TARAKNATH CHANDRA, Opposite Party. 27th May 1909.

*Workmen's Breach of Contract Act (XIII of 1859)—Mechanic receiving a share of the profits, whether a workman or artificer within the meaning of the Act—Sec. 2, wilful default—Want of reasonable excuse.*

The Petitioner entered into an agreement on the 20th April 1907 with Messrs. Khan & Co., of Calcutta, for serving under them as joiner and polisher of surgical instruments for three years on a salary of Rs. 30 per mensem, and took Rs. 54 in advance to be deducted from his salary at the rate of Rs. 1-8 per mensem. The agreement ran thus:—"Besides the above salary I shall get a commission at the rate of 10 per cent. on the profits after deducting from the net profit 20 per cent. of the reserve fund to be calculated after deducting the establishment charges and expenses from the gross profit. And if during the period of the aforesaid agreement, God forbid, your firm is closed then I shall get a commission at the rate of 10 per cent. out of the money if there be any in the reserve fund, and let it also be known that if during the period of my said agreement the proprietors decide to withdraw the money of the aforesaid reserve fund, then I shall also get a commission from the same. . . . If at any time willingly or without any reasonable cause or excuse I neglect my work or if I be unwilling or absent then I shall be liable to be punished under secs. 2 and 3 of Act XIII of 1859."

The accounts were not adjusted at the end of the year as per agreement, and the Petitioner after repeatedly demanding his share of the profits after adjusting the accounts, left work. Proceedings were then taken against him under sec. 2 of Act XIII of 1859 before the 4th Presidency Magistrate, who ordered the Petitioner to execute a recognizance for his working during the remaining period. The Petitioner then moved the High Court and obtained this rule.

*Held*—That the Petitioner being partly remunerated by a share of the profits of the firm, was more a partner than a workman, and as such, not liable to be dealt with according to the provisions of Act XIII of 1859.

*Held also*—That the accounts not having been adjusted at the end of the year as provided for in the agreement, it cannot be said that the Petitioner had wilfully neglected to do the work or that he had no reasonable excuse for doing so.

*Babu Sharat Chandra Roy Chowdhry* for the Petitioner.

*Mr. S. K. Chakraborty* with *Babus Hiralal Chakravarti* and *Tarakeswar Pal Chowdhry* for the Opposite Party.

H. L. C.

Rule made absolute.

**CIVIL APPELLATE JURISDICTION.** Before STEPHEN and VINCENT, JJ. APPEAL FROM ORDER NO. 140 OF 1908. BISHUNDEO NARAIN SINGH AND OTHERS, Appellants v. GIRIDHARI MAHTO AND OTHERS, Respondents. Heard, 10th and 11th June. Judgment, 15th June 1909.

*Revenue Sale Law (Act XI of 1859), secs. 2 and 3—Arrears of revenue.*

The suit which gave rise to this appeal was brought to set aside a revenue sale that took place on the 6th June 1906 by which an estate in which the Plaintiff-Appellants had a nine annas odd share was sold to the Defendant. The suit was decreed by the Subordinate Judge, but his decision was reversed on appeal by the District Judge. The point on which the first Court based its decision and the only point raised before the lower Appellate Court was that at the date of the sale there was no arrear of revenue for which the sale could be held. This was also the point raised in the High Court.

The original kistibundi of 1840 prescribed an annual revenue of Rs. 14-10-3 payable by instalments of Rs. 7-5-0 in December and Rs. 7-5-3 in March. The District Town Roll showed that the revenue was Rs. 14-2-3 and the instalments' dates were the 12th January in respect of Rs. 9-10 and the 28th March in respect of Rs. 4-8-9, the meaning of which was that the dates named were those fixed by the Board of Revenue under sec. 3 of the Land Revenue Sales Act, 1859, as the dates by which arrears were to be paid in order to prevent a public sale.

The first Court held that there was no payment by the proprietors of the mouzah for the instalment of March 1906 and that it was in respect of this default that the sale took place. The lower Appellate Court held that the first Court had taken the date for the latest payment under sec. 3 for the date indicating when an unpaid sum became an arrear under sec. 2, and that the sum for non-payment of which the sale was held must have become an arrear before the 28th March 1906.

*Held*—That the lower Appellate Court was right as to the mistake made by the first Court.

The case was remanded as there was no finding that any arrear was due at the time of the sale or in respect of what period it was due.

*Babbs Mohendra Nath Roy* and *Surenendra Nath Ghosal* for the Appellants.

*Dr. Priya Nath Sen* and *Babu Kulwant Sahay* for the Respondents.

A. T. M.

Case remanded.

# THE Calcutta Weekly Notes.

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### REPORTS (See Index.)

THE HONOURABLE THE CHIEF JUSTICE AND THE Judges have decided to sit on Saturdays in order to work off the arrears of civil and criminal business which have been accumulating on the Appellate Side of the High Court. The following notice dated the 14th July 1909 was accordingly issued last week to the members of the Bar and the Vakils Association.

On and from Saturday, the 17th July 1909, and on every succeeding Saturday until further order, the following Benches shall be formed consisting of:—

The Chief Justice	Criminal and Defended admitted appeals and Revision Cases.
Mr. Justice Caspersz	
Mr. Justice Coxe	Do. Do.
Mr. Justice Ryves	
Mr. Justice Stephen	Civil and Criminal Motions of the Districts comprising the Patna Group.
Mr. Justice Chatterjee	
Mr. Justice Moolwerjee	Do. Presidency Group.
Mr. Justice Vincent	
Mr. Justice Chitty	Do. Rajshahye Group.
Mr. Justice Carnduff	
Mr. Justice Sharfuddin	Do. Burdwan Group.
Mr. Justice Richardson	

The Benches will exercise Civil and Criminal Appellate and Revisional Jurisdiction for the purpose of hearing the matters and cases indicated above against each.

All motions, both Civil and Criminal, shall ordinarily be taken only on Saturdays; motions of a very urgent nature may, however, be made on other days.

WE DO NOT THINK THAT THE SATURDAY SITTINGS, which, we presume, will not extend beyond 2 P. M., will in any way inconvenience the members of the profession. The state of arrears on the Ap-

pellate Side and necessarily the interest of litigants called for some adequate measures for coping with it. We hope that the willing co-operation of the profession with the Judges in their desire to work off the arrears will produce some appreciable impression on the present congestion of business on the Appellate Side.

WE ARE GLAD TO NOTICE IN PARTICULAR THAT under the new arrangement two Benches will take exclusively criminal business on Saturdays, whilst the Civil Divisional Benches will also take criminal motions of the local divisions assigned to them. We have on more than one occasion pointed out the difficulties of short term prisoners and those represented by junior counsel or pleaders in moving the High Court for relief (see ante p. cclxix). We therefore welcome the change and feel confident that it will meet with the approval of the profession.

THE JUDGMENT OF MR. JUSTICE FLETCHER IN the libel action of *Lala Lajpat Rai v. The Englishman Ltd.*, which we are reporting in this issue at p. 895, is remarkable in many respects. It contains a clear exposition of the law regarding the limitations of fair comment and the responsibility of newspaper editors and publishers regarding the publication of libellous matter from privileged official reports. There can be no question that when such reports are distorted or supplemented by facts which are defamatory of the Plaintiff and which the publisher is not in a position to prove, such facts must be presumed to be untrue and the publisher must be prepared to take the consequences of it. Such distortion of the report or the addition of supplementary allegations, which one is not prepared to prove, cannot also be regarded as fair comment. When a publisher has thus transgressed the limits of fair comments, the most straightforward course for him is to express his regret. In the absence of any justification or, in fact, any defence to a libel action an obstinate refusal to retract or withdraw the libel, leaves no option to a fair-minded judge but to mulct the Defendant in damages in proportion to the magnitude of the libel. The judgment of Fletcher, J., in the above respects does no more than lay down the settled law. But the concluding portion of His

Lordship's judgment which deals with the question whether the fact of a person having been deported under Reg. III of 1818 should be admitted in a Court of law as affecting his general character or taken into consideration as a ground for mitigation of damages is deserving of special attention. The reasonings of the learned Judge for his decision on this question seem to us to be eminently sound and his conclusions unexceptionable.

IN OUR ISSUE OF THE 5TH OF JULY LAST, WE REVIEWED that portion of the New Turkish Constitution which assured the personal liberty of the subject. In the present issue we shall sketch the constitution of the General Assembly or the Chamber of Deputies and the Senate and at the same time indicate the responsibility of Ministers. It may not be out of place here to point out that one of the articles of the constitution which deals with the responsibility of public officials generally in respect of acts which may not be legal has an obvious bearing on the responsibility of ministers and the liberty of the subject. This article makes obedience due to a superior only when the order given is legal. In respect of acts contrary to law an official acts at his own risk and responsibility and the fact that he has obeyed an official superior will not exempt him from liability. In this respect as in many others the Turkish Constitution has borrowed one of the well-known principles of the English constitution.

THE CHAMBER OF DEPUTIES OR THE TURKISH General Assembly which corresponds to the House of Commons has a more uniform constitution than the British Lower House. One Deputy is assigned to every 50,000 males of the Ottoman nationality. We have pointed out before that the basis of nationality in New Turkey is linguistic and not racial or religious. No one who does not understand the Turkish language is eligible as a Deputy. It is further provided that after the first period of four years, eligibility will be dependent upon the ability to read Turkish, and, as far as possible, to write in that language. It must be remembered that the Ottoman Empire is composed of congeries of races and peoples professing diverse faiths and speaking various languages. The constitution reserves no political privilege for, or attaches no disqualification to, any religious faith but the ability to read, write and understand the Turkish language having been made a necessary qualification, the constitution gives a fair chance to all alike to acquire this qualification within the period of four years. A further reason for this language qualification is the desire of the Turkish Government to avoid the difficulties of language which have arisen in the heterogeneous Parliament of the Austro-Hungarian Empire.

THE OTHER DISQUALIFICATIONS ARE THAT ANY one under the age of thirty, or in the service of a private individual, or an undischarged bankrupt, or one notoriously in disrepute or under judicial sentence is ineligible as a Deputy. Although a Deputy has to be elected from amongst the inhabitants of the province to which a representative is assigned yet the Deputy, when elected, represents the whole of the Ottoman people and not merely his constituency. Every Deputy is to receive 20,000 piastres per session and a travelling allowance. He cannot be arrested or prosecuted during the session, except for a flagrant crime, unless a majority of the Chamber authorises his prosecution. The Chamber of Deputies meets on the 1st of November every year and continues to sit till the 1st of March. The sittings may be prolonged or abridged at the discretion of the Sultan. But it must be remembered that the Sultan is now a constitutional Sovereign and cannot arbitrarily dissolve the General Assembly without the advice of responsible ministers.

GENERAL ELECTION OF DEPUTIES IS TO TAKE PLACE every four years and should commence at least four months before the 1st of November. In case of dissolution by imperial decree a general election must be held in such time that the Chamber may meet within six months of the dissolution. As in England, the opening of the session is marked by a speech from the Throne. All the members of the Assembly have to take an oath of fidelity and bind themselves to observe the constitution. The members are free to vote as they like and to express any opinion they please. They cannot be bound by any promise or conditions for voting and cannot be prosecuted for any opinions expressed or votes given during debate. The sittings of the Chamber of Deputies are ordinarily public but the Chamber may constitute itself into secret Committee on the motion of ministers, the President or fifteen members, which is carried by vote. The President and two Vice-Presidents of the Chamber are selected by the Sovereign from amongst nine members selected by the Chamber by a majority of votes.

THE DUTIES OF THE CHAMBER ARE ORDINARILY to discuss the Bills submitted to it by the ministers; to adopt, amend or reject provisions affecting finances or the constitution; to examine the Budget and settle the yearly expenditure with the ministers and to determine with the ministers the nature, amount and the mode of assessment of the revenue. The Chamber or the Senate may also initiate a new law or amend an old one regarding matters within their province and their Bill may be adopted by the Sultan. A draft Bill once thrown out by either the Senate or the Chamber cannot be

brought forward a second time in the same session and when re-introduced each article of it and the whole Bill must be passed by a majority of votes in both Chambers.

THE TURKISH SENATE IS AN IMPROVEMENT ON the English House of Lords. It is given a definite constitution and to it is assigned also some definite duties. The President and the members of the Senate are to be nominated for life directly by the Sultan. After the deposition of Abdul Hamid, it may be assumed that members of the Senate will be appointed on the recommendation of ministers responsible to the Chamber of Deputies. The number of Senators are not to exceed a third of the members of the Chamber. To be a Senator, one must be at least forty years of age, must have shown by his acts that he is worthy of public confidence or rendered signal service to the State. Senators are to receive 10,000 piastres per month but if holding any other public office they are to get only the difference between this stipend and their salary.

THE SENATE IS ESSENTIALLY A REVISING CHAMBER. It is to examine Bills, sent up from the Chamber of Deputies and if it finds a provision contrary to the sovereign rights of the Sultan, or to liberty, or the constitution, etc., it either rejects it definitely by a vote, assigning its reasons, or it sends the Bill back, with its observations, to the Lower House, demanding that it should be modified or amended in the sense of those observations. It also examines petitions and transmits those which it thinks deserving of reference, with its observations, to the Vizier.

THE MINISTERS ARE MADE RESPONSIBLE FOR THEIR acts and measures and power is given to members of the Chamber of Deputies to lodge a complaint against any minister, which, at the discretion of the President of the Assembly and a Special Committee of the House, may be brought before the whole Chamber. If the Committee's report is adopted, an address praying for the trial of the minister is to be transmitted to the Grand Vizier and will be remitted by the Sultan to the High Court. The ministers, though appointed independently of the General Assembly, have the right to be present or be represented at the sittings of either House, and when required by a vote, they are bound to give explanations. When the General Assembly is not sitting, ministers may adopt measures for the protection of the State which would provisionally have the force of law but they must submit them to the Chamber for approval immediately upon the meeting of the Assembly. In case of a conflict between the ministers and

the Chamber of Deputies upon a Bill on which any minister is of opinion that he should insist, the Sultan may change his ministers or dissolve the Assembly, subject to the provisions that the re-election must take place within such period that the Chamber may re-assemble within six months.

THE GRAND VIZIER IS THE CHIEF OF THE MINISTERS. He is appointed by the Sultan at his pleasure. His position and powers are more like that of the German Chancellor than that of the English Prime Minister. He not only presides over the Cabinet of ministers but exercises control over every department of State and takes action in measures presented to him by heads of departments either by consulting the Cabinet or with the sanction of the Sultan or independently in anticipation of the approval of the Sultan. But the dismissal of the Grand Vizier and the displacement of Abdul Hamid by his brother at the instance of the constitutional party have made both the Turkish Sultan and his Grand Vizier a constitutional Sovereign and a constitutional minister.

## CRIMINAL CASES OF 1908.

(Continued from p. ccxxxiii).

REFERENCE TO SUPERIOR MAGISTRATE.—[Sec. 346]. A commitment by a Magistrate to whom a case has been submitted, without himself taking the evidence *de novo*, is legal. Sec. 532 does not apply to such commitments (*Kamini v. Fakir*, 12 C. W. N. 136). Sec. 346 does not permit a first class Magistrate, having jurisdiction to commit, to send the case to a District Magistrate empowered under sec. 30 (7 C. W. N. 457, 460). [Sec. 349]. A second or third class Magistrate who thinks that the accused should be bound down under sec. 106 must refer the whole case to a superior Magistrate without passing any part of the sentence himself (*Rohimuddi v. Emperor*, 35 Cal. 1093: see also 21 Cal. 622).

SEC. 350.—[Principle—Sessions Judge]. It is a general rule of law that a Court which gives judgment shall have itself heard the evidence. (*Deputy Legal Remembrancer v. Upendra*, 12 C. W. N. 140, 144: see also 23 W. R. Cr. 59: 2 N. W. P. 468: 4 C. L. R. 452: 20 Cal. 878: 23 Cal. 194). The section makes an exception only in favour of Magistrates but a Sessions Judge cannot act thereunder (*Durga v. Emperor*, 8 C. L. J. 59: see also W. R. 1804, p. 32: 21 W. R. Cr. 77: 23 W. R. Cr. 59: 3 Mad. 112), even with the consent of the accused (26 Bom. 50: 8 C. L. J. 59).

[Scope of section—Succession to office]. It has recently been held that sec. 350 applies not only where one Magistrate succeeds another on transfer, but also where a case is transferred under sec. 548



(*Mohesh v. Emperor*, 35 Cal. 457). This case is really in conflict with *Deputy Legal Remembrancer v. Upendra*, 12 C. W. N. 140, though the Court sought to distinguish it on a ground which did not form the basis of the decision. No doubt Mitra, J.'s judgment in 12 C. W. N. 140 is not consistent in all its parts, as remarked in 35 Cal. 457, but his view was always understood to be the law: see the cases cited in 12 C. W. N. 140 and 35 Cal. 459, and also 12 All. 66: 20 Cal. 870, 873: cf. 3 Mad. 112, 113: 2 N. W. P. 468.

[*Trial de novo*]. Where in a trial the accused demands the re-call and fresh examination of witnesses, they must be again examined in-chief (*Sobh v. Emperor*, 12 C. W. N. 138).

READING OVER DEPOSITIONS.—The deposition of a witness which was not read over to him in the presence of the accused or his pleader is inadmissible on the subsequent trial of the witness for perjury (*Mohendra v. Emperor*, 12 C. W. N. 845). The rule was also so laid down in 23 W. R. Cr. 28: 13 Cal. 121 and 28 Mad. 308. But the law is complied with if it is read in the presence of a pleader for one out of several accused (*Rakkhal Chandra v. King-Emperor*, 9 C. L. J. 690). In *Debi v. Emperor*, 11 C. W. N. 470, it was held that the omission to read over the deposition in a land registration proceeding did not render it inadmissible, and that the Board of Revenue resolution requiring compliance in this respect with the Civil Procedure Code was not law. The omission of the attestation clause that the evidence was read over and admitted correct, when in fact it was so done, does not render the deposition inadmissible (*Queen v. Lekhray*, 2 N. W. P. 132 p. 137). As to the admissibility of the deposition in the trial itself against the accused then being proceeded against, see 13 W. R. Cr. 1, 7, and 14 W. R. Cr. 13.

JUDGMENT.—[*Meaning of*]. An order of discharge under sec. 253 is not a judgment, which means an order in a trial of conviction or acquittal (*Emperor v. Maheswara*, 31 Mad. 543: see also 28 Cal. 652, per Prinsep, J., but Ghose, J., contra, and 29 Cal. 726. An order of dismissal of a complaint under sec. 203 is not a judgment, (28 Mad. 126 per C. J.) As to what is a judgment under cl. 15 of the Letters Patent, see 29 Cal. 286.

[*Supplement by Explanation*]. A Magistrate cannot supplement a judgment by an explanation on a rule (*Fura v. King-Emperor*, 7 C. L. J. 738: see also 6 C. W. N. 118: 25 Cal. 625: 7 C. W. N. 859: 9 C. W. N. lxxv: 2 C. L. J. 524, 529: 10 C. W. N. ccxxxiii).

REVIEW.—A Magistrate cannot review an order under sec. 145 (*Parbati v. Sajjad*, 35 Cal. 350), nor can a Judge review an order dismissing an application for sanction for default of appearance (*Re Gopal*, 32 Bom. 203).

EXECUTION OF SENTENCES.—[*Imprisonment for*

*whipping*]. A Magistrate cannot, when on a medical certificate before the infliction of whipping, the sentence is reduced in consequence to fewer stripes, commute the whipping to imprisonment (*Re Public Prosecutor*, 51 Mad. 84). Fine cannot be ordered in lieu of whipping in (11 All. 308: 21 All. 25). [*Sentence of imprisonment*]. Imprisonment under sec. 123 is not a "sentence of imprisonment" (*Foghi v. Emperor*, 31 Mad. 515: see also 27 Mad. 525: 2 Weir 452: sed contra. *Emperor v. Tula*, 30 All. 334 (F. B.) partly followed in *Emperor v. Nepal*, 13 C. W. N. 318).

APPEAL.—A District Magistrate may withdraw a part-heard appeal under sec. 407 but he is not bound to examine witnesses summoned by the Subordinate Magistrate under sec. 428. (*Alagu v. Emperor*, 31 Mad. 277). This is very questionable law.

APPELLATE COURT.—[*Powers of—Re-trial*]. Where the trial is invalid on legal grounds, and the real question of fact in issue has not been tried, there should be a re-trial unless there is no evidence or a small chance of conviction. The mere disagreement between Judge and assessors is no ground for acquittal (*Durga v. Emperor*, 8 C. L. J. 59). No re-trial can be had when the verdict of the jury is set aside and there is no evidence (*Kashi v. Emperor*, 12 C. W. N. lxxx). It has been held that the High Court does not ordinarily direct re-trial on setting aside a conviction for illegality or want of jurisdiction, as proceedings may be taken again independently of its order (*Liakat v. Emperor*, 12 C. W. N. 246). The ordinary practice is just the other way.

[*Defective judgment*]. The judgment must show, on the face of it, that the case of each accused has been considered, and reasons should be given, so far as necessary, showing that the Court directed its attention to the case of each accused (*Jamait v. Emperor*, 35 Cal. 138). The Appellate Court's judgment cannot be read as supplemented by that of the first Court (*Ibid*: see also 7 C. W. N. 30).

E. H. MONNIER.

(To be continued)

## Review.

THE LAWS OF ENGLAND. Being a complete statement of the whole law of England. By the Right Honourable the Earl of Halsbury. Lord High Chancellor of Great Britain: 1885-86, 1886-92, and 1895-1905 and other lawyers. Vol. VII. London: Butterworth & Co, 11 and 12 Bell Yard, Temple Bar. Law Publishers. 1909.

The main titles dealt with in this volume are Constitutional Law (so much of it as has not been dealt with in Vol. VI), Contempt of Court and Contract. The topics of constitutional law treated of in this volume are "The Crown and the Executive" and "The Hereditary and Private Reve

nues of the Crown." The former topic is of abiding interest to students of constitutional law whilst the latter, in so far as it deals with such subjects as "The Crown's right to Foreshore," "to land formed by "Alluvion and Diluvion," "Escheat," "Wreck," "Treasure trove" and "Fisheries," is of great practical importance to lawyers and to the public in this country. The Law of Contempt is ably summarised by J. C. Fox, Esq., a Master of the Supreme Court (Chancery Division). As an up-to-date account of the law, this summary is of considerable value. The references to cases and the holdings of the Courts therein, contained in the foot-note—which in bulk exceed the summary of legal propositions embodied in the text—make it still more valuable. The title "Contract" does not at this date admit of treatment on altogether original lines. But it is dealt with in this work as satisfactorily as in any standard treatise on the subject. Only the general principles of the law of contract are considered under this title. Such special topics as "Agency" and "Carriers" and others such as "Master and Servant," "Partnership," etc. have been separately dealt with or reserved for special treatment under those titles. Under the heading "Parties to Contract" we find a section devoted and very rightly to "contracts with unincorporated associations" which, read with the treatment of the title "Club," already noticed on a previous occasion, brings together the law on a subject of growing importance. It is not necessary to deal more in detail with this title. But we think it right to notice that the Indian Contract Act" is mentioned in the very first page in connection with the definition of the term "contract." Sir Frederick Pollock has said some very hard things about this enactment in his edition of the "Indian Contract Act." It is therefore gratifying to observe that there are others outside India who are of a different opinion and cite it as an authority.

## Notes of Cases.

### ENGLISH LAW COURTS.

**COURT OF CRIMINAL APPEAL.**—*Rex v. Joseph Stoddart.* Before THE LORD CHIEF JUSTICE, AND JUSTICES DARLING, PHILLMORE, BRAY AND LAWRENCE. 28th May 1907.

*Jurisdiction—Onus of proof—Misdirection of the Jury—Miscarriage of Justice.*

This was an appeal from a conviction for conspiracy and false pretences. The case for the prosecution was that Joseph Stoddart had an office in London and another in Middleburgh in Holland. He was the proprietor of and issued during 1907 and part of 1908, a paper called the "Football Record." This publication announced that £400

was every week divided amongst competitors who predicted a certain number of correct results. Between October 12, 1907, and September 24, 1908, evidence was given, that the names of 13 persons were published as winners who either did not in fact exist or to whom no prizes had been sent. The accused denied that he had any knowledge that any of the 13 bogus winners were, in fact, bogus, and further gave evidence that he had parted with the money for distribution but that his servants had committed the fraud without his knowledge or connivance. In the course of the judgment of the Court allowing the appeal and quashing the conviction the following observations were made:—

It was contended that the Court had no jurisdiction to try and convict on the counts for obtaining money by false pretences, inasmuch as the postal orders and letters containing money were received by the Defendant's agent at Middleburgh, and that by the rules of the competition Stoddart was only responsible for money received there. In the opinion of the Court, there is not the slightest ground for this objection to the jurisdiction. The false pretence, if made, was to induce the persons to part with money and send it to Middleburgh, either by postal order or in stamps or cash, and when the postal orders and letters containing money were posted in London or within the jurisdiction of the Central Criminal Court for transmission to Middleburgh, there to be received by the Defendant, the offence was complete. In "*Rex v. T. S. Jones*" (1 Den. C. C. pp. 551, 609) a similar contention was raised and decided against the Defendant, and that case has been followed in many others. (See Archbold's Criminal Pleading, 23rd Ed. p. 609).

On the question of burden of proof and misdirection to the jury the Court observed:—

There remains to be considered a very important point raised by Mr. Abinger at the conclusion of the trial, and in respect of which he applied for leave to appeal, and that is as to the direction of the learned Recorder that the *onus* of proof had been shifted from the prosecution to the Defendant. This raises a very important question, in our opinion, the only question of difficulty in the whole case—namely, as to the proper direction as to *onus* of proof where *prima facie* evidence has been given on the part of the prosecution which, if unanswered, would raise a presumption upon which the jury might be justified in finding a verdict of guilty, and the Defendant has called evidence to rebut that presumption. Presumption of fact which afford evidence of guilt vary in degree. As pointed out at p. 340 of the 23rd edition of Archbold, facts and circumstances may raise a presumption so strong that guilt necessarily follows, or they may raise a presumption upon which the jury might be directed that if satisfied

by the evidence that the facts alleged by the prosecution are established and no explanation is offered, they, in some cases, ought to find a verdict of guilty, or they may be of so little weight that the jury ought to be told that they raise no presumption which calls for an answer from the Defendant. In our opinion when it was once established that, in repeated issues of the paper of which the Defendant Stoddart was the proprietor, a series of announcement had been published for a number of weeks stating that certain persons, whose names and addresses were given, had gained prizes, and that in the event of no scrutiny being demanded the amounts would be sent to them on named dates, and when it was proved that subsequently, as in the month of May, 1908, an announcement was made recording the results of 30 competitions and stating that 13 competitors had received prizes as to whom it was, in fact, proved that they were bogus competitors and that no money had been received in respect of these prizes by any *bona fide* competitors—when this was established and proved, evidence had been given which called for some explanation, and had the case rested there, the Recorder would have been justified in telling the jury that in the absence of any explanation they would be justified in finding that Joseph Stoddart was a party to a conspiracy to put forward false representations in order to defraud the public. The question, however, in this case is as to the direction which ought to be given where, as in this case, the Defendant gave and called evidence in answer to that *prima facie* case. It seems to us that the jury should have been told that if they accepted the explanation given by and on behalf of Stoddart, or if that explanation raised in their minds a reasonable doubt as to his guilt, they should acquit him, as the onus of proof that he was guilty still lay upon the prosecution. If upon the whole evidence the jury are left in a real state of doubt the prosecution has failed to satisfy the onus of proof which lies upon them.

If these directions had been addressed to what may be called a minor incident in the case, as, for instance some particular question of fact, set up by the Defendant as an incident in or a part only of his defence, it would be necessary to consider the question of the alleged misdirection from a different point of view. But in dealing with them it must be borne in mind that the one substantial issue raised by the Defendant Stoddart from the beginning to the end of the trial was that the insertion of the bogus names and addresses as winners was the act of Catling, Clinge, and other persons who were conspiring to unlawfully obtain a part of the prize money which he (Stoddart) was supplying, and it seems to the Court that the jury ought to have been told that the prosecution having given *prima facie* evidence from which the guilt of the

Defendant might be presumed, and which, therefore, called for explanation by the Defendant, the jury ought to consider the evidence upon both sides, and if upon a review of the whole of the evidence they were satisfied that the prosecution had made out the case that the Defendant Stoddart was a party to the conspiracy they should convict him, but that if their minds were left in a state of doubt they ought to acquit him, as the burden of proving the Defendant's guilt was still upon the prosecution. The passages which have been cited at length are the only passages in the summing up which bear directly upon the question of the onus of proof. The concluding words of caution at the end of the summing up cannot be said to qualify the specific direction to which attention has been called. In the opinion of the Court the jury may have thought that if Stoddart had not proved that he had supplied moneys in every case they must convict him, whereas the direction ought to have been that they must be satisfied, after consideration of all the evidence, that the Crown had proved that Stoddart was a party to the conspiracy, and, if in doubt, they ought to acquit him. It is in failing to adequately explain this that the Court is of opinion that there was a substantial misdirection. Moreover, the direction in this case was the more important, because inasmuch as the learned Recorder told the jury that in a great majority of the cases he considered that the existence of a conspiracy to defraud Stoddart was made out. It was, therefore, for them to consider whether a conspiracy might not extend to all the cases as to which the prosecution had given evidence. Had there been any other passages qualifying this direction or directing the jury in accordance with the law as we have stated it the conclusion might be different; but the passages cited are the only specific directions given by the learned Recorder to the jury, and the general caution at the conclusion of the summing up as to entertaining a reasonable doubt does not appear to the Court to modify the effect of these directions as to onus of proof.

Notwithstanding the view which we have expressed, we have had seriously to consider whether we ought not to dismiss the appeal under the proviso of sub-sec. 1 of sec. 4 of the Criminal Appeal Act, 1907, on the ground that no substantial miscarriage of justice has actually occurred. This, in our opinion, raises a question of great difficulty. The explanation given by Stoddart as to many of the cases was most unsatisfactory. There was, in the opinion of the Court, strong evidence against him to support the view taken by the jury; but we cannot say that the facts established are inconsistent with his innocence. Attention was called upon this point to the judgment of this Court in "*Rex v. Dyson*" (1908, 72 J. P. 272, and 1 Cohen's Criminal Appeal Re-

ports, at p. 95), in which in delivering the judgment of the Court dealing with this proviso I said that we could not in that case say that if they had been properly directed the jury must have come to the conclusion which would have supported the conviction. We think it is open to consideration whether the word "must" is not too strong, and whether the proper question is not, whether if properly directed the jury would have returned the same verdict. We are unable to come to the conclusion that in this case if the jury had been properly directed they would have thought that the facts proved were inconsistent with the Defendant's innocence, and might not have had a doubt whether the prosecution had failed to satisfy them that the defence set up by Stoddart that the bogus winners were inserted without his knowledge by persons conspiring against him was not made out. The fact that the jury were not agreed as to Caling's guilt and returned no verdict against him on the conspiracy counts affords some ground for this contention, that under a proper direction the jury might have had a reasonable doubt as to Stoddart's guilt.

We cannot part from this case without making some observations which may, we trust, be of service with reference to the practice of this Court. As appears from the judgment which has just been delivered, the case for the Appellant was conducted by making a minute and critical examination, not only of every part of the summing-up, but of the whole conduct of the trial. Objections were raised which, if sound, ought to have been taken at the trial. Probably no summing-up, and certainly none that attempts to deal with the incidents as to which the evidence has extended over a period of 20 days, would fail to be open to some objection. To quote Lord Fisher's words in *Abrath v. The North-Eastern Railway Company* (11 Q. B. D.):—"It is no misdirection not to tell the jury everything which might have been told them. Again, there is no misdirection unless the Judge has told them something wrong or unless what he has told them would make wrong that which he has left them to understand. Non-direction merely is not misdirection, and those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood." Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to

deal with valid objections to matters which may have led to a miscarriage of justice.

B. D.

## CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL APPELLATE JURISDICTION. Before CASPERSZ and RYVES, JJ. CRIMINAL APPEAL NO. 504 OF 1909 AND CRIMINAL REFERENCE NO. 19 OF 1909. EMPEROR v. BHEDU SHEIKH, Accused. 30th June 1909.

*Murder—Circumstantial evidence—Sentence of death—Commutation, grounds justifying.*

In this case the accused was, in a trial by jury, convicted by the Sessions Judge under sec. 302, I. P. C. and sentenced to death. The majority of the jury by 4 to 1 gave their verdict against the accused. It appears that the accused married one M, a widow with two sons and two daughters, and was himself living in the house of the widow. The children of the widow and the widow herself did not pull on well with the accused who was of very indolent habits. On the 15th October there seems to have been a quarrel between the parties and the accused and the widow went to bed without dinner. On the morning of the next day the younger son of the widow, aged 9 years, after taking his meal at his brother's house accompanied the accused to do some work in a khal where it was alleged by the prosecution that the accused murdered the boy by striking him with a dao. The accused absconded after the occurrence, but was arrested after five or six months and put on his trial. He made a confession, in which he said *inter alia* that his wife, the mother of the boy, was of bad character and her paramour gave him much trouble. That on the 15th October he was not given any food and that on the 16th morning he struck the boy at the khal as he was being greatly annoyed by the boy, &c. &c. . . . The prosecution produced an eye-witness to the murder whose evidence was not accepted by their Lordships.

But their Lordships observed on the circumstantial evidence and on the question of sentence as follows:—

"We are not prepared to say that Niamut saw the actual blow struck, but the facts that the accused took Sabed Ali, (the deceased boy) to the ghāt, that Sabed Ali's dead body was immediately after found on the bank of the khal, that the accused was seen running away with a dao in his hand on the opposite bank and that he was not arrested for five months, leave no doubt that he was the actual murderer. . . . The accused, it appears, is of an excessively excitable temperament and holding as we do that he had received

considerable provocation on the night of the 15th October, though not of course from his victim, we are not prepared, in the circumstances of this case, to affirm the sentence of death. It is also possible that shortly before the murder, the accused had received some provocation, whether of the description mentioned in his confession or otherwise, we cannot confidently say, but the circumstances are such that we think the single blow causing the death of Sabed Ali was delivered without premeditation. Although the boy, Sabed Ali, could not be the author of grave and sudden provocation sufficient to justify the attack made upon him, we think the facts were probably such that the accused did not commit the offence with that degree of malice which would call for the infliction of the capital penalty."

*Babu Akhil Bandhu Guha* for the Accused.

*Mr. Orr, Deputy Legal Remembrancer* for the Crown.

B. C.

- *Death sentence commuted to transportation for life.*

CIVIL APPELLATE JURISDICTION. Before COX and CHATTERJEE, JJ. APPEAL FROM APPELLATE DECREE NO. 2723 OF 1907. BALIKANTA DASS, Appellant *v.* RAM TAHAL DAS, Respondent. 21st June 1909.

*Tenancy in common or separate tenancies—Landlord demising undivided moieties of a plot of land successively to two tenants—Right of the tenants to partition the plot between themselves.*

The Plaintiff Respondent brought a suit for partition of a jote against the Defendant Appellant on the allegation that the predecessors in interest of the Plaintiff and the Defendant were joint-tenants of the jote. It appears that by a *patta* the landlord demised half of a plot of land to the Defendant, and the Defendant took possession of a moiety of the land according to his own selection. About 2 years after, the other moiety of the land was demised by the landlord to the vendor of the Plaintiff who took possession of the remaining moiety which was unoccupied by the Defendant. Subsequently the landlord got a decree for ejectment against this vendor but the vendor took a fresh settlement by executing a fresh *kabuliyat* for "the half share of the land after deducting the half share held by Balikanta Das." Some years after this, the Plaintiff got this jote by purchase from the vendor.

The Munsif held that the Plaintiff and the Defendant were not joint in estate and dismissed the Plaintiff's suit. It appears that the Defendant was in possession of more than half of the plot of the land. The Plaintiff appealed and the District Judge on the authorities of the cases of *Hari Charan Bose v. Raja Ranjit Singh*, 1 C. W. N.

521 and *Bhubon Mohon Shaha v. Gour Chandra Shaha*, 11 C. W. N. p. cxxvii, held that as there could not be occupancy holdings in respect of undivided shares of land, the Plaintiff and the Defendant had a joint holding in the plot and in this view he made a decree for partition. The Defendant preferred a second appeal.

*Babu Brajendra Nath Chatterjee* for the Appellant contended that the *pattah* could not create the tenancy unless and until the tenant got possession of the land demised. Here the landlord must be held by his conduct to have given option to the tenant to select the half of the land granted by the *patta* and the tenancy came into existence when he selected the half and occupied it. If the Defendant had got more than a moiety of the land, the landlord might demand excess rent for the excess, but the Plaintiff could not claim the excess land. The subsequent settlement with the Plaintiff's vendor after the ejectment decree showed that his tenancy was a distinct one consisting of only the lands which were left unoccupied by the Appellant.

*Babu Harendra Narayan Mitra* for the Respondent contended that according to justice, equity and good conscience, the Defendant ought not to be allowed to hold more than a moiety and the Plaintiff less than a moiety. The District Judge had directed that partition should follow, as far as possible, the lines of actual possession, so that the Defendant would not suffer any loss, only he would have to give up the lands in excess of his share to the Plaintiff. When half of the land was demised to the Defendant and the other half to the Plaintiff's predecessor without any division by metes and bounds, it must be held that the land was demised half and half. The Plaintiff would suffer a loss if no partition be allowed as he has got less than half.

Referred to I. L. R. 24 Cal. 557 at p. 583 and I. L. R. 12 All. 51, last para of the judgment.

*Held*—The Plaintiff's tenancy was distinct from that of the Defendant and the Plaintiff could not get a decree for partition.

*Appeal decreed.*

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### REPORTS (See Index.)

THE SPEECH OF LORD ALVERSTON, THE LORD Chief Justice of England, at the Lord Mayor's Dinner to the Judges at the Mansion House this year is a most emphatic protest against the encroachment by the Executive on the province of the Judiciary. He appealed not only to the Judges of England but to the Judges of the Empire and reminded them that in the past "the Judges had stood between the Crown and the liberties of the people and had protected the people" and that "if certain things were true that they said in the Press," the Judges may, in the future, be called upon to protect the interests of the people against the Executive. The speech was delivered on the 18th of June and having regard to some current events the Lord Chief Justice's weighty utterances are deserving of special attention in this country as well. A more momentous speech has seldom been delivered by a judge of such eminence and there can be little doubt that the following words would be a source of inspiration to many a judge throughout the length and breadth of the British Empire to be true to the noblest traditions of the British Judiciary.

## THE LORD CHIEF JUSTICE SAID:—

There were present that night judges from New Zealand, India, South Africa, Jamaica, Burma, Nigeria, the Gold Coast, and he believed, some other dominions, and it was his privilege to speak not only for these judges from distant parts of the Empire, but also for the County Court judges—many of them very distinguished men—and for the Metropolitan magistrates, of whom his old friend, Sir Albert de Rutzen, was the head. One of his predecessors, speaking in that hall about twenty-five years ago, said that the happiness and welfare of the people largely depended upon the pure administration of justice. That statement, made by Sir Alexander Cockburn twenty-five years ago, was true to-day: and he rejoiced to think that he might, responding on behalf of his Majesty's judges, feel that the judiciary of this country—nay, more, the judiciary of the Empire—commanded the respect of the subjects of his Majesty. Time was when the judges had stood between the Crown and the liberties of the people and had protected the people. That was a duty which was not likely ever again to fall upon his Majesty's judges in any part of the Empire, because his most gracious Majesty was among the first to recognise what were the proper relations between the Crown and the judiciary. But if certain things were true which they saw in the Press, it might be that the judges would be called upon in the future to protect the interests of the people against the Executive.

THE LORD CHIEF JUSTICE'S SPEECH IN THE following passage may be said to strike the very key-note of the success and popularity of the Judges on the English Bench. We have wasted much money, time and discussion in India about the best means of training our judges and now the weighty pronouncement of the Lord Chief Justice ought to set this much debated question at rest. The Lord Chief Justice asked:—

To what did they attribute the confidence which was felt in the judiciary of this Empire? In his opinion it was to a large extent owing to the fact that their ranks were recruited from the experienced members of the Bar. He had often spoken with men in other countries of the system under which judges were trained to their duties without practising at the Bar, and he was satisfied that the main reason for the high regard in which the English Bench was held was that it was recruited from the men who in their profession had learned boldness, impartiality, respect for other people's opinion, and freedom of speech. The judges did not court popularity—that was the last thing they ought to do—but there was not one of them who did not rejoice that the Bench was trusted by the community. Whatever might be the failings of individuals, there was a determination among all his Majesty's judges to devote the whole of their energies to their judicial work. It was not given to all of them to be a Mansfield, an Eldon, a Cairns, or a Jessel, but at least every judge, from the highest to the lowest, might strive that when he put off his ermine for the last time, the public criticism of his life might be, "He was an upright and fearless judge."

THE FOLLOWING INTERESTING STATISTICS OF Indian crime are quoted by a reviewer of Mr. H. L. Adam's Work on Indian Criminal in the columns of a recent number of the *English Law Times*. We have in reviewing the criminal judicial statistics remarked on previous occasions that it is highly anomalous that in a country with such a low record of crime as India, the criminal law should be administered with so much rigour. We are glad to find that our observations are quite independently borne out by the reviewer of this work.

During the quinquennial period ending with 1903 the average number of reported offences per annum was 1,402, 579. According to the census of 1901 the population amounted to 31,830,884. Of these charges 83 per cent. were returned as true, and 1,050,805 cases were brought to trial. A very large proportion, however, were of a trivial character. The number of persons concerned in the cases averaged 0.75 of the population. It must not, however, be supposed that these figures represent all the crime of the country, for a great many crimes were never traced, while others were never reported.

Madras heads the list of provinces with the heaviest burden of cases, having a ratio of eighty per 10,000 of the population. Bombay shows a ratio of seventy-eight; Burma, seventy-one; North-West Frontier Provinces, sixty-two; Punjab, forty-nine; Central Provinces, thirty-one; Bengal and the United Provinces, twenty-five; while Assam occupies the lowest and therefore most honourable position with a ratio of twenty-four.

Crimes of violence are said to be most rife in the Punjab and Bombay. "On an average about 500 persons are sentenced to death annually; 1,600 to transportation; 130,000 to rigorous and 15,000 to simple imprisonment; 630,000 to fine; and 23,000 to whipping." The figures for rigorous imprisonment and whipping seem very high; and we may hope that Lord Merley has not yet finished with the question of corporal punishment.

THE CALCUTTA AND THE SUBURBAN POLICE Amendment Bill, that has been just introduced in the Bengal Council, is an extraordinary piece of legislation in many respects. It consists mostly of clauses borrowed from the City of Bombay Police Act of 1902. Two of the chief features of this amending Bill are (1) that it goes to increase the powers of the Police and (2) that it seeks to exempt the members of the Police force, Magistrates and public servants from any civil and criminal liability for acts in excess of their duty or authority. As regards the first, amongst others, cl. 14 of the Bill which gives increased powers to the Police Commissioner to interfere with and prohibit public amusement or private entertainment, such as singing and music; utterances of public cries of all kinds, be they of joy or those of street hawkers; procession or public assemblies, which obviously include public meetings, will be strongly objected to by the people of this country since it is a matter of common experience with them that even the existing powers of the Police are often unreasonably and arbitrarily exercised by them. Such increase of powers becomes all the more objection-

able in view of the fact that the Bill seeks to place Police-officers and public servants beyond the pale of law. This Bill furnishes a specific instance of the complaint made by the Lord Chief Justice of England regarding the attempted encroachment by the Executive on the jurisdiction of Law Courts and the liberties of the people, who are as a matter of right entitled to the protection of His Majesty's Judges against the abuse of powers either by the Police or public servants.

THE BOMBAY CITY POLICE ACT OF 1902 IN SPITE of its many objectionable features, holds sec. 19 thereof *in terrorem* over police-officers against any unlawful or vexatious misuse of powers by permitting criminal prosecution of offending police-officers and providing penalty extending to six months' imprisonment or fine of Rs. 500 or both for any abuse of powers. It does not certainly reflect any credit on the author of the Bengal Bill that he should have passed over this section without even giving any reason for this very serious omission in the Statement of Objects and Reasons of the Bill. We publish below the missing section and hope that it will be included in the Bill.

Sec. 19. Any police-officer who—

(a) without lawful authority or reasonable cause, enters or searches or causes to be entered or searched, any building, vessel, tent or place,

(b) vexatiously and unnecessarily seizes the property of any person,

(c) vexatiously and unnecessarily detains, searches or arrests any person,

(d) vexatiously and unnecessarily delays forwarding any person arrested to a Magistrate or to any other authority to whom he is legally bound to forward such person,

(e) offers any unnecessary personal violence to any person in his custody, or

(f) holds out any threat or promise not warranted by law to an accused person,

shall for every such offence be punished with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees, or with both.

NO LESS REMARKABLE IS THE EXCUSE PUT FORWARD in the Statement of Objects and Reasons for replacing sec. 99 of the Calcutta Police Act by sec. 140 of the Bombay Act. It is said that the object is to supply an omission in the Suburban Police Act and to bring the latter in line with the Calcutta Act regarding "notice of actions" and "tender of amends." Then it is said that only for the sake of "uniformity" the more up-to-date section of the Bombay Act is made to replace sec. 99 of the Calcutta Act. But a inspection of the Bombay section would at once show that it has very little in common with the Calcutta section and that its object is not at all to give "notice of action" to police-officers but to bar, if possible, all civil actions against police-officers and public servants. It appears from the proceedings of the Bombay Council that the non-official mem-



bers regarded the Bombay section in that light and that they being in the minority had to give in. A clause that is open to serious objection and was carried into law on the teeth of non-official opposition at Bombay cannot with any propriety be imported amongst us, with the avowed object of only supplying an omission in the Suburban Act, to replace a far more reasonable provision of the Calcutta Act.

THE PROVISIONS OF SEC. 99 OF THE CALCUTTA Police Act, may be "antiquated" in so far as it follows long established practice and well established principles of law which do not deprive the person aggrieved of the right to seek relief for wrongs or damages done but provides some necessary safe-guards against a police-officer being harassed by vexatious suits. Sec. 99 of the Calcutta Police Act runs as follows:—

99. Clause 1.—All actions and prosecutions against any person, which may be lawfully brought for anything done, or intended to be done, under the provisions of this Act, shall be commenced within three months after the act complained of shall have been committed, and not otherwise;

and notice in writing of such action, and of the causes thereof, shall be given to the defendant one month at least before the commencement of the action;

and in every such action it shall be expressly alleged in the plaint that the act complained of was done maliciously and without reasonable or probable cause;

and if at the trial of any such action, upon the general issue being pleaded as hereinafter provided, the plaintiff shall fail to prove such allegation, he shall be non-suited, and a verdict shall be given for the defendant.

Clause 2.—The defendant in any such action may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon;

and no plaintiff shall recover in any such action, if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into Court after such action brought, by or on behalf of the defendant;

and if a verdict shall pass for the defendant, or the plaintiff shall become non-suit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases;

and, though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant unless the Judge, before whom the trial shall be, shall certify his approbation of the action and of the verdict obtained thereupon.

IT IS TO BE REGRETTED THAT THE NOTE AS regards the proposed amendment of the above section as contained in this Bill and which is in the following terms is very misleading.

29. Clause 13.—The Suburban Act contains no provisions, such as are enacted in section 99 of the Calcutta Act, as to limitation and notice of actions, and tender of amends. To remedy this defect, it is proposed, by clause 23 of the Bill, to introduce into the Suburban Act section 140 of the Bombay Act, which deals with these matters. It is also proposed, for the sake of uniformity, to introduce that sec-

tion into the Calcutta Act, in place of section 99 thereof, which is framed in antiquated terms.

Sec. 104 of the Bombay Act which is proposed to be substituted for the so-called "antiquated" sec. 99 of the Calcutta Police Act is rather sweeping in its terms for protecting every "intended pursuance of duty," and runs as follows:—

"(1) No Magistrate or Police-officer shall be liable to any penalty or to payment of damages on account of any act done in good faith in pursuance or intended pursuance of any duty imposed or authority conferred on him by this Act or any rule, order or direction lawfully made or given hereafter.

(2) No public servant or person duly appointed or authorized shall be liable as aforesaid for giving effect in good faith to any such order or direction issued with apparent authority by the Lieutenant-Governor or by a person empowered in that behalf under this Act or any rule made hereunder.

(3) In any case of an alleged offence by a Magistrate, Police-officer or other person, or of a wrong alleged to have been done by a Magistrate, Police officer or other person, by any act done under colour or in excess of any such duty or authority as aforesaid, or wherein it appears to the Court that the offence or wrong, if committed or done, was of the character aforesaid, the prosecution or suit shall not be entertained or shall be dismissed, if instituted more than three months after the date of the act complained of.

(4) The plaint in any such suit shall be rejected if it does not expressly allege that the act complained of was done maliciously and without reasonable or probable cause; and any such suit shall be dismissed if, in the case of an action for damages, tender of sufficient amends has been made before the suit was brought or a sufficient sum of money is paid into Court, with costs, by or on behalf of the Defendant, after the institution of the suit."

It will be noticed that there is not a word of "notice of actions" in the section of the Bombay Act. The Bombay section is, besides, both ill-drafted and ambiguous and it is only by implication regarding the limitation of an action in sub-cl. (3) and regarding the rejection of plaints where no malice is alleged in sub-cl. (4) that it may be inferred that the section in question does not alter all bar civil actions.

HARDLY LESS SERIOUS WOULD BE THE CONSEQUENCES of the omission of the words "day time" from sec. 60 of the Police Act and thus conferring a licence to the Police to raid houses at night. The existing law does not hamper the Police in any way. The present practice is that on receiving information which may justify a house search, the Police even at night time proceed to the place and surround or guard the house and at day-break proceed with the search. If, however, power is given to them to effect an entrance into and search houses at night it may lead to incalculable mischief. Householders would be deprived of the presence of neighbours, friends or relations or even of respectable search witnesses at night time and the Police may in the darkness of night and in the absence of any respectable and independent witnesses do as they like. Having regard to the indiscriminate house searches that became a matter

of daily occupation of the Police a short while ago, it would be highly injudicious and undesirable to invest the Police with powers for night searches. We hope that the amendment proposed will be abandoned.

### CRIMINAL CASES OF 1908.

(Continued from p. ccxxxix).

APPELLATE COURT.—[*Finding of common object*].

(1) The common object should be set out in the charge, and the accused is entitled to know with certainty and accuracy the exact nature of the charge: otherwise he is prejudiced [*Behari v. Queen-Empress*, 11 Cal. 106 (referred to in *Balmakand v. Gansamram*, 22 Cal. 391, followed in *Poresh v. Emperor*, 33 Cal. 295), *Sabir v. Queen-Empress*, 22 Cal. 276; *Chunder v. Queen-Empress*, 3 C. W. N. 605]. (2) It is necessary in order to support a conviction of rioting that there should be a clear finding as to the common object, and the common object so found should have been stated in the charge (*Sabir v. Queen-Empress* supra, followed in 33 Cal. 295). If the judgments of a trying Magistrate and the Appellate Court do not contain such finding, the conviction is bad on that ground alone (*Poresh v. Emperor* supra: contra 21 Cal. 827), unless the common object was not disputed in the Courts below, and the Appellate Court intended to find the same common object as was stated in the charge (*Dasarathi v. Raghu*, 36 Cal. 158: see also *Rajendra v. Emperor*, 12 C. W. N. lxxxviii). (3) If the charge alleges several common objects, the Appellate Court must determine whether it is sustainable, and if so, which common object is established (*Manaruddi v. Emperor*, 35 Cal. 718). (4) Where the common object in the charge and that found do not agree in essential particulars the conviction is bad (*Silajit v. King-Emperor*, 13 C. W. N. 801: see 33 Cal. 295: 27 Cal. 990: 11 C. W. N. clviii). [Order as to fee]. The Appellate Court cannot set aside an order under sec. 31 of the Court Fees Act (*Emperor v. Maddipatla*, 31 Mad. 547).

FULL BENCH REVIEW.—The High Court has power under cl. 26 of the Letters Patent to review the whole case (*Emperor v. Narayan*, 32 Bom. 191). This is now settled law (1 Cal. 207: 2 Bom. 61: 17 Cal. 642: 25 Mad. 61: 4 C. W. N. 433).

REVISION BY LOWER COURT.—[*Further enquiry on same facts*]. It was held in *Lakshminarasappa v. Mekala*, 31 Mad. 133, that the District Magistrate cannot set aside an order of discharge on the ground that the lower Court had not appreciated the evidence correctly. But this has since been overruled by the Full Bench in *Re Narayan*, 1909 19 Mad. L. J. 157. See also 15 Cal. 508 (F. B.): 9 All. 52 (F. B.): 10 Bom. 131 and 14 Mad. 334 (F. B.).

[Commitment by superior Court]. Under sec.

436 the superior Court may itself commit, or direct the Subordinate Magistrate to do so (*Sessions Judge v. Malinga*, 21 Mad. 40: see also 10 Bom. 319, referring to 10 B. L. R. 289 and 28 Cal. 397: sed contra 4 W. R. Cr. L. 4).

[Notice]. An order for further enquiry without notice is bad (*Giridhari v. Emperor*, 12 C. W. N. 822). No notice is necessary strictly according to law, but as a matter of discretion such notice should be given (15 Cal. 608 (F. B.): 3 C. W. N. 249: 4 C. W. N. 100: 10 Cal. 207: 9 All. 52: 20 All. 339: 26 Mad. 41: 32 Cal. 1090: 9 C. W. N. cclxxix: 2 C. L. J. 611: 3 C. L. J. 43: 11 C. W. N. 173: 11 C. W. N. 316: see 18 Cal. 75: 31 Mad. 543-546) (but not in cases of dismissal of complaint under sec. 203 (15 Cal. 608, 617, 624: 29 Cal. 457, contra 11 C. W. N. 316: 11 C. W. N. xxxv).

REVISION BY THE HIGH COURT.—[Discretion—Practice]. The High Court will not entertain a revision application where the lower Court has concurrent jurisdiction, as under sec. 337, unless an application has been made to and rejected by such Court [*Shafaqutullah v. Wali*, 30 All. 116: *Gullay v. Bakar*, 28 All. 268: All. W. N. (1904) 232]. But this rule has been extended to cases where the Judge can only refer the case to the High Court under sec. 438, but cannot pass a final order himself (*Re Bhuyan*, 13 C. W. N. 753). This last case is questionable. (i) The case of *Queen-Empress v. Reolah*, 14 Cal. 887, on which it relies, does not support it as the Court actually heard the application there. (ii) The Sessions Court and the District have no concurrent jurisdiction except under secs. 436, 437, as a Court has concurrent jurisdiction with another only when it has power to deal with the subject-matter in the same way. (iii) The rule is unnecessary and harassing, as the party has, whether the lower Court refers the case or not, to come ultimately to the High Court. (iv) A Sessions Judge has power to refer a case under sec. 145, Cr. P. C., (5 C. W. N. 71), but the Bench which decided 13 C. W. N. 573 always heard applications under sec. 145 direct.

E. H. MONNIER.

(To be continued.)

### Notes of Cases.

#### ENGLISH LAW COURTS.

COURT OF CRIMINAL APPEAL. *Rex v. John Edmunds*. Before THE LORD CHIEF JUSTICE, JUSTICES JELF AND LAWRENCE. 19th June 1909.

Attempt to murder—Deposition of injured person who subsequently died, if admissible to prove charge altered to one of murder—Accelerating death, if murder.

This was an appeal from a conviction for murder. The prisoner had shot the deceased woman in the mouth and cut her throat on February 20th. On April 23rd she had recovered sufficiently to give evidence against the prisoner, but on May 5th she died. It was contended on appeal that the medical evidence at the trial did not sufficiently show that the death was caused by the prisoner's acts.

THE LORD CHIEF JUSTICE in dismissing the appeal observed:—

Depositions had been taken from this woman at a time when it was expected that she would recover, and the charge against the prisoner was one of attempting to murder: but when the depositions were put in afterwards the charge had become one of murder. Objection was taken that depositions taken under one charge could not be used in support of another; but it was clear from "*R. v. Beeston*" (Dears. 405) and "*R. v. Lee*" (4 F. and F. 63), with which cases the Court fully agreed, that such depositions in a case like the present could be properly received. Mr. Bosanquet did not now dispute this. His other ground of appeal was that the evidence was not sufficient to support the charge. There was no question of improper direction, for the summing up was careful and accurate; but the question was whether the death was in fact caused by the acts of the prisoner. If the death was accelerated by his acts, even though the victim was in a weak state of health at the time, that would still be murder. The evidence as to the nature of the injuries and the medical opinion formed as to their effect were such that the jury could properly conclude that the death was caused, or at least substantially accelerated, by them. The other learned Judges took the same view.

*Appeal dismissed.*

COURT OF APPEAL. *Burberrys v. Mayer and another*. Before THE LORD CHIEF JUSTICE OF ENGLAND, LORDS JUSTICES FLETCHER MOULTON AND FARWELL. 17th May 1909.

*Husband and wife, suit against, for things supplied to wife—Wife held liable, appeal by—New trial if may be ordered as against husband as well as wife—Election of remedy.*

The plaintiffs sued Mr. Mayer and his wife for the price of goods sold and delivered. The goods had been supplied on the wife's orders. The husband paid for one lot by his cheque. The goods in question were all ladies' wear except two coats and a hat. Each defendant tried to make the other liable. Since the goods had been ordered the parties had been divorced, although at the date of the order the husband allowed an yearly payment to his wife for maintenance. The jury

found for the Plaintiffs against the wife. The wife applied for judgment or a new trial.

THE LORD CHIEF JUSTICE in the course of his judgment observed:—"It was contended on behalf of the husband that the Plaintiffs, having elected at the trial to go against the wife and having obtained judgment against her, ought not to be allowed now to ask for a further remedy against the husband, and that, if a new trial was ordered, it ought only to be between the Plaintiffs and the wife. On the other hand, it was contended for the wife that she was entitled to judgment on the ground that there was no evidence of liability on her part, and that a new trial, if any, ought to be between the Plaintiffs and the husband only. In my opinion the proper order to make is to direct a new trial as between all the parties."

The Lord Justices concurred.

Mr. McCall, K. C., and Mr. Cantby appeared for the wife.

Mr. Salter, K. C., and Mr. Colam for the Plaintiffs.

Mr. S. Fox, K. C., and Mr. W. Stewart for Mr. Mayer.

*New trial ordered.*

#### PRIVY COUNCIL.

[APPEAL FROM BENGAL].

LORD MACNAGHTEN.	}	DURGADUT SINGH and ors.,
LORD ATKINSON.		<i>v.</i>
LORD COLLINS.		MAHARAJA SIR RAMESH-
SIR ANDREW SCOBLE.		WAR SINGH BAHADUR,
1909,		and
29, June.		TARADUT SINGH,
		<i>v.</i>
		MAHARAJA SIR RAMESH-
		WAR SINGH BAHADUR
		and others.

*Babuana grants—Impartibility—Alienability.*

These were consolidated appeals against two decrees of the High Court of Calcutta, both dated 10th April 1905.

The first decree affirmed a decree of the Subordinate Judge of Mozufferpur, dated the 29th March 1901, pronounced in Suit No. 114 of 1899, brought by the Maharaja as mortgagee against Durgadut Singh the mortgagor and others to enforce a mortgage, dated the 14th April 1892, of a certain Pergunnah named Jabdi. The second decree reversed a decree of another Subordinate Judge of Mozufferpur, dated the 13th July 1903, pronounced in Suit No. 89 of 1901, instituted by Taradut, the grandson of the mortgagor, a minor, through his mother as next friend against the Maharaja to have it declared that the said mortgage was void and that two decrees, dated the 18th February 1895 and 21st April 1896, respectively, passed in favour of the mortgagee in two suits

brought by him to recover arrears of interest which had fallen due upon the mortgage and in which the mortgagor and all the members of the family of which he was the head (two of them being minors) had been made parties, be cancelled.

The grant of the Pergunnah Jabdi was originally made in 1807 by the then head of the family, Maharaja Madho Singh, to his son Kirat Singh, the father of Durgadut Singh, as a *babuana* grant, and the question was whether Durgadut Singh had the power of mortgaging the property. Admittedly the lands or usufructs granted by the grant were impartible—descending to the eldest male heirs of the grantee to be held or managed by the person to whom they descended for the maintenance of the family and that, on failure of male descendants they reverted to the Raj and became the property of the Maharaja for the time being, or that the interest granted then ceased to exist, and that meanwhile the Government revenue was payable by the grantee or the person to whom the property should descend, through the Maharaja, failing which the Maharaja might himself pay the revenue and recover decrees for the amounts paid against such person and put up the property to sale in execution.

LORD ATKINSON in delivering their Lordships' judgment observed that without doubt, the property was impartible, that is to say, those who for the time being were entitled to be maintained out of it could not have it divided amongst them by proceedings in the nature of partition. But it by no means followed that by reason of this fact, the property was inalienable. The authorities, on the contrary, established that property though impartible might be alienable. The main argument on behalf of the Appellants before their Lordships was that every member of the family (of which the Maharaja as owner of the Raj was the head) had such an inextinguishable right to maintenance out of the Raj, that if the property was permitted to be alienated, the right to maintenance of the present and prospective members of the family would revive as against the Raj. Their Lordships were unable to accept this theory as to the peculiar nature of the right to maintenance. "In cases governed by the Mitakshara law, a father may sell or mortgage not only his own share but his sons' shares in the family property in order to satisfy an antecedent debt of his own, not being of an illegal or immoral character, and such transaction may be enforced against his sons by a suit and by proceedings in execution to which they were no parties." Notwithstanding the impartibility of property granted by a *babuana* grant, such property comes apparently, in the absence of some special family custom regulating its enjoyment, within this principle. The Appellants were unable to prove any custom prohibiting alienation. "The absence of evidence of an alien-

ation, without any evidence of facts which would make it probable that an alienation would have been made, cannot be accepted as proof of a custom of inalienability." Their Lordships were clearly of opinion that both the decrees of the High Court were right and should be affirmed, and both appeals should be dismissed with costs.

N. G.

*Appeals dismissed.*

#### PRIVY COUNCIL.

LORD MACNAGHTEN.	} KUNWAR RAGHBIR SINGH, Appellant, v. MUSAMMAT MOTI KUNWAR, Respondent.
LORD DUNEDINS.	
SIR ANDREW SCOBLE.	
SIR ARTHUR WILSON.	

29, June 1909.

• *Leave to appeal granted by High Court in case valued above 10,000, refused in cross case valued less—Special leave—Direction as to preparing transcripts.*

This was an application for special leave to appeal to His Majesty in Council against the judgment and decree of the High Court of Judicature for the North-Western Provinces. The facts were as follows:—On the 7th November 1903, Musammat Moti Kunwar, Respondent, instituted the present suit to recover Rs. 5,000 odd against the Appellant on account of her share of the profits in respect of a 10 biswa share of Mouzah Kanchansel. She alleged that her deceased husband, Baldeo Singh, was the owner of the Zemindari and that on his death she became owner of the Zemindari, and her name was recorded as proprietor in the revenue papers. The Appellant was the recorded co-sharer of the remaining 10 biswa share and was the Lambardar of the village. The Appellant's defence was that the aforesaid Baldeo Singh was a member of a joint and undivided Hindu family at the time of his death, and that the Appellant and one Sati Singh succeeded to the family property, which included Mouzah Kanchansa, by right of survivorship and that the Respondent was entitled to maintenance only. The Assistant Collector of first class who decided the suit did not decide the nature of the family. He held that the entry of the Plaintiff's name in the revenue records was conclusive evidence of her title for the purposes of the suit for profits in a Revenue Court under sec. 201 of the Agra Tenancy Act (11th of 1901 local), and therefore decreed the suit. He was of opinion that the Defendant's remedy was to obtain a declaration of his title from the Civil Court. The Defendant appealed against this decree to the High Court at Allahabad, and it was registered as F. A. No. 243 of 1904.

Subsequently the Appellant and one Kunwar Sati Singh instituted a civil suit in the Court of the Subordinate Judge of Maiapuri for a declaration that they were the surviving members of a

joint Hindu family of which the aforesaid Baldeo Singh was an undivided member. This suit was valued at 1 lakh of rupees. The defence was that Baldeo Singh was separate. The Subordinate Judge found that the aforesaid Baldeo Singh was an undivided member of the joint family and decreed the suit accordingly. The Respondent appealed to the High Court and it was registered as F. A. No. 297 of 1907.

Both these appeals were heard together by the High Court which came to the conclusion contrary to that of the Subordinate Judge and therefore dismissed the former appeal and allowed the latter. The Appellant applied to the High Court for leave to appeal to His Majesty in Council against their decree in both cases. The High Court admitted the appeal in F. A. No. 297 of 1907, in which the suit was valued at 1 lakh of rupees, but refused to grant leave in F. A. No. 243 of 1904, on the ground that the amount involved in the appeal was less than Rs. 10,000, and that the appeal did not involve a substantial question of law.

*Messrs. De Gruyther, K. C., and Bhugwandin Dube* appeared for the Petitioner. It was submitted that the suit out of which the appeal arose was connected with and depended entirely upon the decision in the other suit in which an appeal to His Majesty in Council had already been admitted.

The order of their Lordships was delivered by LORD MACNAGHTEN.—Their Lordships would humbly advise His Majesty that special leave to appeal to His Majesty in Council be granted. The Registrar of the High Court at Allahabad ought to be directed to transmit only such documents relating to the appeal as are not already included in the other appeal. Security £100. The present appeal to be consolidated with the other appeal.

*Messrs. Barrow, Rogers and Nevill*, Solicitors for the Appellant.

Special leave granted.

### CALCUTTA HIGH COURT.

Recent decisions not yet reported,

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before JENKINS, C. J., and CASPERSZ, J. CRIMINAL REVISION NO. 626 of 1909. NEPAL CHANDRA BHATTACHARYA AND TWO OTHERS, Petitioners v. KALA CHAND DHALI, Opposite Party. 15th July.

*Indian Penal Code, sec. 114—Antecedent acts—Sec. 378, dishonest intention—Claim of title.*

The story of the prosecution was that several persons under the orders of the Petitioner No. 1 and under the supervision of Petitioners Nos. 2 and

3 cut and removed paddy from a plot of land in possession of the Opposite Party. The defence was that the Petitioners took no part in the occurrence, and that the land in question belonged, not to the Opposite Party, but to one Jatra Dhali. The trying Deputy Magistrate disbelieved the defence, and convicted all the Petitioners under sec. 379 read with sec. 114 of the Penal Code. He sentenced the Petitioners to one month's rigorous imprisonment and a fine of rupees twenty each. The conviction and sentence were upheld on appeal.

With respect to the applicability of sec. 114, the trying Magistrate observed:—"It has been proved that the first accused gave orders to reap the complainant's paddy, while the other two supervised the reaping, but there is no evidence that they actually reaped or removed paddy with their own hands. Under the circumstances I find all of them guilty under sec. 379 read with sec. 114 of the Penal Code."

The Petitioners then moved the High Court and obtained this rule.

Their Lordships held, following the case of *Abhi Mitter*, I. L. R. 27 Cal 566, that in order to bring a person within the purview of sec. 114 of the Penal Code, it must be shown that there were antecedent acts, so that, if absent, the accused would have been liable as an abettor.

The appeal was therefore directed to be re-heard and the attention of the Court of Appeal below was also drawn to the case of *Hari Bhumali v. Emperor*, 9 C. W. N. 974, which lays down that there can be no conviction for theft when the accused asserts a claim of right, unless the Court is in a position to say that the claim is not *bona fide*, but a mere pretence.

*Babus Dasarathi Sanyal and Hiralal Chakravarti* for the Petitioners.

*Mr. Chippendale* for the Crown.

H. L. C.

Rule made absolute.

CIVIL APPELLATE JURISDICTION. Before COX and CHATTERJEE, JJ. APPEAL FROM APPELLATE DECREE NO. 2091 OF 1907. RAM KUMAR SHAHA PODDAR, Appellant v. RAM GOUR SHAHA CHOWDHURY, Respondent. 8th June 1909.

*Civil Procedure Code (Act XIV of 1882), sec. 313—Suit for recovery of money, maintainability—Limitation Act (XX of 1877), Sch. II, Art. 62.*

The Defendant-Appellant in this suit instituted a suit against one Burlar. He obtained a decree and in execution put up a certain jote to sale as being the property of Burlar. This property was purchased by the Plaintiff. Subsequently a certain Mrs. Dillamy brought a suit, in which she made the present Plaintiff and the present

Defendant parties, for a declaration that the jote belonged not to Burlar but to herself, and in the suit she obtained a decree. The Plaintiff then brought this suit for recovery of the money which he had paid for his purchase. The suit was decreed and the Defendant appealed.

*Held*—That the suit was maintainable.

*Hari Doyal v. Sheikh Shamsuddin* (5 C. W. N. 240) and *Nityananda Roy v. Jagat Chandra* (7 C. W. N. 105) followed.

*Dorabally v. Executor of Khaja Mahiuddin* (I. L. R. 3 Cal. 806) and *Sowdamini Chowdhurani v. Kishen Kishore Poddar* (12 W. R. F. B. 5) explained and distinguished.

*Sundara Gopalan v. Venkata Varada* (I. L. R. 17 Mad. 228) dissented from.

*Held also*—That if Burlar had no right at all to the property that was sold and there was no delivery of possession in consequence, there was no consideration at all for the purchase money that was paid; and the suit would come under Art. 62, Sch. II of the Limitation Act.

*Hanuman Kamat v. Hanuman Mandar* (I. L. R. 19 Cal. 123) referred to.

*Babus Harendra Narayan Mitter and Surendra Nath Ghosal* for the Appellant.

*Babus Nil Madhab Bose and Dharendra Lal Kastgir* for the Respondent.

A. T. M.

Case sent down.

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J., and MOOKERJEE, J. LETTERS PATENT APPEAL NO. 84 OF 1908. GURU PRO-SANNO LAHIRI AND ANOTHER, Plaintiffs, (Special Respondents) *v.* AMBICAMOYI DASSYA AND OTHERS, Defendants (Special Appellants). 21st June 1909.

*Letters Patent appeal, if lies—Order of remand.*

The suit was instituted to recover possession of an occupancy holding on the ground that the raiyat died without leaving any heirs. Defendant No. 1 pleaded *inter alia* that by local custom or usage the occupancy holding was transferable, and that as there were heirs still living, the Plaintiffs had no cause of action. Defendant No. 2 pleaded that he was an under-raiyat under Defendant No. 1 and that in any case he could not be evicted.

The Munsif held that the occupancy holding was transferable and dismissed the suit. The appeal by the Plaintiff was dismissed on appeal to the High Court and the case was remanded, (the finding as to the custom of transferability being based upon inadmissible evidence) with a direction to decide the question on such evidence as was admissible in law. On remand it was held that the custom was not proved and the suit was decreed. The lower Appellate Court declined to decide the

question as to whether there was a failure of heirs, because in its opinion such heirs not being parties to the suit were not bound by the result of the suit and that if they had any right they would be entitled to enforce their right in an independent suit.

The Defendants appealed to the High Court, which remanded the case for a finding whether there was a failure of heirs or not. The Plaintiffs appealed under sec. 15 of the Letters Patent.

*Held*—That no appeal lay from the order of remand as it did not amount to a "judgment" within sec. 15 of the Letters Patent.

*Kali Kristo Paul v. Ram Chunder Nag* (I. L. R. 8 Cal. 147) followed.

*Babus Dwarka Nath Chuckerbutty and Debendra Nath Bagchi* for the Appellants.

*Babu Samatul Chunder Dutt* for the Respondents.

A. T. M.

Appeal dismissed.

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J., and MOOKERJEE, J. APPEAL FROM APPELLATE DECREE NO. 1698 OF 1907. ROMA NATH HUDATIN, Defendant No. 1, Appellant *v.* JOTE KUMAR MUKHERJEE, Plaintiff, Respondent. 28th June 1909.

*Bengal Tenancy Act (VII of 1885), sec. 29, cl. (b) and proviso—Enhancement—Improvement—Burden of proof.*

The suit was for rent at the rate of Rs. 22-2-6 and by way of defence to the claim it was pleaded that the rent was only Rs. 7-1-9. It was ultimately admitted by the Plaintiff that the original rent was Rs. 7-1-9, but it was claimed that it had been enhanced and rightly enhanced to the figure at which it was sought to be recovered.

The point that arose on appeal was whether the provision contained in sec. 29, cl. (b) read with the second proviso of the Bengal Tenancy Act did not afford a complete answer to the Plaintiff's claim.

*Held*—A landlord to entitle himself to recover more than the rate indicated in cl. (b) must establish the conditions set forth in the second proviso, that is to say, when the enhancement was on the ground of improvement it was incumbent on him to show that the improvement was effected and that it existed and substantially produced its estimated effect in respect of the holding.

*Babu Bepin Behary Ghose* for the Appellant.

*Babus Hara Kumar Mitra and Sarat Kumar Mitha* for the Respondent.

A. T. M.

Appeal decreed.

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A FULL BENCH OF THE MADRAS HIGH COURT IN the case of *Venkata Kristnayya v. Lakshmi Narayana*, I. L. R. 32 Madras 185 has decided that the money present known as bride price that has sometimes to be paid by bridegrooms, in certain communities, for inducing the father to give his daughter in marriage is immoral and opposed to public policy. We entirely approve of this view of the exactions that are often made in consideration of marriage. We hope that should any case arise with reference to similar exactions by the father of a bridegroom from the bride's father the same view will be taken by our law Courts. Such exaction cannot be regarded as dower. On the other hand the demands by the father or guardian certainly form restraints on marriage and as such must be regarded as illegal. But the question in this case was somewhat different. The facts are that at a partition between brothers certain persons were appointed arbitrators and they gave an award by which they directed that as all the brothers excepting one had been married at the joint family expense, the brother who had not been married would be entitled to recover the amount he would have to spend for his marriage including the bride price. This brother on his marriage had to pay a bride price. He sued the other brothers for the recovery of the amount he had spent on account of his marriage including the bride price.

IT WAS HELD BY THE FULL BENCH THAT THE Plaintiff could not recover the amount which he had paid as the bride price, the reason given being

as stated above that a contract to make a payment to a father in consideration of his giving his daughter in marriage is immoral or opposed to public policy. No doubt when the question arises between the parties to the contract, the contract cannot be enforced. But here the question was not the enforcement of the contract between the parties, but whether a brother who had paid a bride price relying upon an award on a partition would be entitled to get back the money so paid from joint family funds. It appears that the other brothers had been married at the joint expense and that the bride prices in respect of their marriages had been paid from the joint funds, and the arbitrators in consideration of this made the award that the Plaintiff be entitled to get his marriage expenses from the joint family funds. We doubt therefore whether the question of public policy may be said to arise in a suit by a brother for taking out of joint family funds the bride price which, in view of the fact that the other brothers had done the same, might well be regarded as an ordinary item of marriage expense.

IN THE CASE OF *Kullan v. Emperor* REPORTED AT p. 173 of the current I. L. R. Madras series an important question as to the procedure to be adopted in the trial of an approver who has forfeited his pardon was decided. A pardon was tendered to one Kullan by the Committing Magistrate under the orders of the District Magistrate. The man was then examined as a witness before the Committing Magistrate, but at the Sessions trial he retracted his evidence with the result that some of the accused in the case were acquitted. Thereupon the District Magistrate under whose authority the pardon had been granted withdrew the pardon and the approver was then put on his trial and convicted. In his trial in the Sessions Court his main defence was that he had been granted pardon with respect to the offence for which he was being tried and that the District Magistrate was not the proper authority to withdraw the pardon.

THEIR LORDSHIPS (WALLIS AND PINNEY, JJ.) were of opinion that the question whether the pardon was legally withdrawn or not by a proper authority was not of any importance, as in the



present Code of Criminal Procedure, sec. 339, there is no provision that the withdrawal of a pardon is a condition precedent to the trial of the approver. In the preceding Code (Act X of 1882), the words were—"Where a pardon may be tendered under sec. 337 or sec. 338 and any person who has accepted such tender has not complied with the condition on which the tender was made, he may be tried for the offence in respect of which the pardon was tendered, &c. . .," and then the section went on "The statement made by a person who has accepted a tender of pardon may be given in evidence against him when the pardon has been withdrawn under this section." In this state of the law it was held in *Queen-Empress v. Ganga Charan*, I. L. R. 11 All. 79, that making a full and true disclosure was a condition precedent to the right to pardon and that where a pardon has been tendered and accepted and not withdrawn, it could be pleaded in bar of further proceedings.

BUT THE QUESTION IS WHETHER SUCH IS THE LAW under sec. 339 of the present Code. In this section the language used is similar but there is an important change namely in sub-sec. 2 where the words "when the pardon has been forfeited under this section" have been substituted for the words "when the pardon has been withdrawn under this section." Hence their Lordships held that under the present Code, there is no necessity for withdrawal, nor has that withdrawal, if actually made, any legal effect. When the approver is put on his trial and he pleads his pardon, it is the duty of the prosecution to prove that by reason of non-disclosure or incomplete disclosure of facts, the approver has forfeited the pardon. This view appears to be amply borne out by the language of sec. 339 of the present Code and as the language itself is clear and free from ambiguity a Court of Justice cannot go behind the language and enquire what was the previous state of the case law or the statutory law on the point. The words in the section "any person who has accepted such tender has, either by wilfully concealing anything or by giving false evidence, not complied with the condition on which the tender was made, he may be tried &c. . ." show that in order to establish the guilt of the approver it must be proved by the prosecution in the trial that the approver has not complied with the condition on which the tender was made.

#### CRIMINAL CASES OF 1908.

(Continued from p. ccxlviii.)

REVISIONAL JURISDICTION.—[*Local jurisdiction*]. The High Court has no jurisdiction over the

Political Resident at Manipur or his criminal proceedings (*Raj Kumar v. Emperor*, 12 C. W. N. 602, 603). [Order under sec. 144]. It has power to set aside an order under sec. 144 directing the removal of property into Court, and to restore the *statu quo* (*Leong v. Chung*, 12 C. W. N. 1044).

[Orders under secs. 203, 209, 253, by Presidency Magistrates]. In some cases it was held that, as secs. 436 and 437 do not apply to Presidency Magistrates, the High Court cannot order further inquiry or commitment under the Code, but only under sec. 15 of the Charter Act (1 C. W. N. 49: 27 Cal. 126: 33 Cal. 1282: 6 C. L. J. 705 and *Cr. R. 461 of 1907*), and not under cl. 23 of the Letters Patent (27 Cal. 126), and then only on a question of jurisdiction and not on the facts (33 Cal. 1282: 6 C. L. J. 705). But these rulings ignore the applicability of sec. 439. The Full Bench case in 15 Cal. 608, 619, considered that sec. 439 gave the High Court jurisdiction, independently of sec. 437, over Subordinate Magistrates, and the same would hold as to Presidency Magistrates. In 26 Cal. 746, the power of the High Court under sec. 439 of the Code and sec. 28 of the Letters Patent was affirmed. The case of *Emperor v. Varjivandas*, 27 Bom. 84, shows that the High Court can order a commitment where a Presidency Magistrate has convicted. The next case on the point is *Lekhraj v. Debi*, 12 C. W. N. 678 where it was held that the High Court can order a further inquiry under sec. 15 of the Charter Act, *even on the merits*, independently of the Code. The last case on the subject, *Malik Pratap v. Khan Muhammad*, Cr. Rev. 710 of 1909 decided by Coxe and Ryves, JJ. on the 24th July, has, however, held that the High Court has jurisdiction under the Code itself.

[Practice]. Where a rule was issued, but the accused could not be found, the Court discharged it, with liberty to apply again when he was found (*Re Gourhari*, 12 C. W. N. 222). In cases of enhancement of sentence the conviction must be considered as conclusive (*Emperor v. Ghinto*, 32 Bom. 162). A Magistrate ought to assist the High Court on the hearing of a rule, and not say that he has no cause to show (*Lekhraj v. Debi*, supra, p. 683).

STAY OF PROCEEDINGS.—[Jurisdiction]. The High Court has power, under sec. 15 of the Charter Act and secs. 28, 29 of the Letters Patent, to stay proceedings when action is taken under sec. 476 by a Subordinate Court (*Jogiah v. Emperor*, 31 Mad. 510: *Raj v. Bama*, 23 Cal. 610, per Ghose, J.: see also 31 Cal. 858: 30 Mad. 226: 8 C. W. N. 222). The power was exercised in 5 C. W. N. 44: 5 C. L. J. 223: 10 C. W. N. 419, 420). The Full Bench case of *Re Ramprasad*, B. L. R. Sup. Vol. 426, is distinguishable, as dealing with the powers of the High Court on civil appeal (34 Cal. 848, 851: 31 Mad. 510). The dicta in

It relating to criminal jurisdiction, though followed in 6 Cal. 308 and some other cases, are obsolete owing to the changes of the law introduced in secs. 195 and 439 by the Code of 1882. This case, besides, did not consider the effect of the Charter Act and Letters Patent. The jurisdiction of the High Court, in the exercise of its *civil revisional* powers, to stay criminal proceedings ordered under sec. 476 has been doubted (*Hem v. Atal*, 35 Cal. 909 following *Raj v. Bama*, 23 Cal. 610 per Rampini, J.). If the proceedings have commenced, the Criminal Bench ought to be asked to stay them (8 C. W. N. xxxi).

[*Grounds of*]. The High Court will stay criminal proceedings if they are oppressive, and will prevent the conduct of a pending appeal (*Fogiah v. Emperor*, 31 Mad. 510: see also *Jady v. Lewis*, 34 Cal. 848), but will not do so when the lower Court thinks it expedient in the interest of justice that the criminal trial should go on (*Hem v. Atal*, 35 Cal. 909: *Re Bal*, 26 Bom. 785).

SPECIAL PROCEEDINGS.—[Section 476.] The word "Court" in sec. 476 does not include a successor in office (*Begu v. Emperor*, 34 Cal. 551 (F. B.), approving of 9 C. W. N. 859, distinguishing 33 Cal. 103 and 11 C. W. N. 119, followed in *Kanto v. Gobardhan*, 35 Cal. 133 and *Kartik v. Emperor*, 35 Cal. 114, dissented from in *In re Gopal*, 32 Bom. 203: see also 29 Mad. 331, contra).

[*Immediate action necessary*]. The Full Bench in 34 Cal. 551 also held that proceedings under the section should be made either at the close of the proceedings or so shortly after as to be part of the proceedings. This was followed in 35 Cal. 114 and *Re Bal* 133, and two Madras Full Benches (*Rahimad-ullah v. Emperor*, 31 Mad. 140, and *Aiyakannu v. Emperor*, 32 Mad. 49: see also *Re Subbaraya*, 15 M. L. J. 489).

[*Judicial proceeding*]. Where information to the police is reported to be false, and the District Magistrate has ordered the prosecution of the informant under sec. 211, I. P. C., the Judge cannot direct the prosecution of the abettor, there being no judicial proceeding before him (*Dharmadas v. Emperor*, 12 C. W. N. 575). Execution proceedings subsequent to the trial of the suit are not judicial proceedings (*Kanto v. Gobardhan*, 35 Cal. 133: see also *Haran v. Emperor*, 32 Cal. 367). A District Magistrate who, on receipt of the police report that the information is false, orders a judicial enquiry by another Magistrate, cannot himself pass an order under sec. 476 (*Abdul v. Emperor*, 7 C. L. J. 371: *Haibat v. Emperor*, 33 Cal. 30), but the enquiring Magistrate may do so (*Haibat v. Emperor*, supra), though the original complaint, when there is one, has not been dismissed under sec. 203 (*Kanchan v. Ram*, 36 Cal. 72).

E. H. MONNIER.

(To be continued.)

## Notes of Cases.

### ENGLISH LAW COURTS.

COURT OF APPEAL. *John Jones & Sons, Ltd. v. The "Financial Times" Ltd.* Before LORDS JUSTICES FLETCHER MOULTON, BUCKLEY and BINGHAM, J. 8th June 1909.

#### *Libel—Privilege—Justification.*

This was the Defendants' appeal. The Plaintiffs sued for libel because the Defendants published the following:—"Receiverships registered—appointments filed at Somerset House under the 1907 Act, John Jones and Sons, Limited, Engineers, Loughborough." As a matter of fact the order of receivership had been obtained against John Jones and Sons, St. George's Ironworks, "Ltd., of Liverpool," but by some mistake of a clerk of Somerset House the notice was filled up with the number of John Jones and Sons, Ltd., instead of the Liverpool firm. The result was that the Defendants' clerk copied the entry from the Register in its wrong form.

The Defendants admitted publication but pleaded that the words complained of were a fair and accurate extract from an official Register and that they published the same in good faith and without malice against the Plaintiffs in discharge of their duty to the public.

Mr. Justice Darling directed the jury, that since the Defendants did not simply copy the entry in the register but added their own words—"Engineers, Loughborough"—the Defendants were liable and the only question for the jury was the amount of damages. The jury found for the Plaintiffs.

LORD JUSTICE FLETCHER MOULTON held that inasmuch as it was admitted that the Plaintiff company was the only firm called "John Jones and Sons, Ltd.," the addition of the words "Engineers, Loughborough" made no difference, and that the Judge's direction was incorrect. The Defendants' plea of privilege and justification was good. Following the principle laid down in *Searless v. Searlett* (1892) 2 Q. B. 56, he allowed the appeal. The other learned Judges took the same view.

*Appeal allowed*

### CALCUTTA HIGH COURT.

#### Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL APPELLATE JURISDICTION. Before JENKINS, C. J., and CASPERSZ, J. CRIMINAL APPEAL No. 302 of 1909 AND CRIMINAL REVISION No. 560 of 1909. ROMESH CHANDRA DAS, Appellant, Petitioner v. THE EMPEROR. 1st July 1909.

*Sentence—Grounds for reducing—Penal Code, secs. 124A and 153A.*

The Appellant was the younger brother of one

Mukunda who was convicted under secs. 124A and 153A, I. P. C., and sentenced to 3 years' rigorous imprisonment for having compiled a booklet called Mukunda's Matripuja. The Appellant was sentenced to 9 months' rigorous imprisonment for having been publisher of the booklet, and thereby having abetted the offences under sec. 124A and 153A, I. P. C.

Their Lordships observed:—

We have read the observations of the Additional District Magistrate in which he states that the book was published in the name of Romesh Chandra Das and that he took an active part in securing and arranging for its publication. On referring to the work in question we see that the name of the petitioner is Romesh Chandra Das &c. There can be no question, therefore, that the petitioner Romesh Chandra Das took an active part in securing the publication of the work. But it is in evidence that he is a youngman twenty years of age and we think that there is force in the learned vakil's contention that he was acting under the guidance and direct instigation of his elder brother Mukunda Lal Das on whom substantial punishment has been inflicted. The petitioner Romesh Chandra Das is on bail and, having regard to all the circumstances of the case, we do not think it necessary that we should re-commit him to custody. The sentence upon him is reduced to the term of imprisonment already undergone, and the appeal allowed to that extent as also the Rule."

*Babu Brajendra Nath Chatterjee* for the Appellant.

CRIMINAL APPELLATE JURISDICTION. Before JENKINS, C. J., and CASPERSZ, J. CRIMINAL APPEAL No. 500 OF 1909 AND CRIMINAL RULE No. 709 OF 1909. NUNDO LAL SINGH AND JOGABANDHU DE, Appellants, Petitioners v. THE EMPEROR. 8th July 1909.

*Forgery—Tampering with a Court record—Sentence, proper—Abetment of forgery—Ingredients of.*

Nanda Lal Sing was charged with having forged a portion of a *solanama* which was filed in Court by a certain person and on which a decree was made. The second accused Jogabandhu was a mohurir who was in charge of the records of the Court and it was found by the lower Court that Jogabandhu made over the records to the other accused Nanda Lal.

The Assistant Sessions Judge of Cuttack convicted Nanda Lal under sec. 466, I. P. C. and sentenced him to 5 years' rigorous imprisonment and Jogabandhu under sec. 484, I. P. C. and sentenced him to 2 years' rigorous imprisonment.

Their Lordships observed:—

"We do not interfere with the sentence (of Nanda Lal) because, in our opinion, it must be made clear that tampering with Court records is an offence that merits substantial punishment.

On the other hand, we consider that the conviction of Jagabandhu Das must be set aside. It may be that he did in fact aid Nanda Lal Sing, but that is not sufficient. For the purpose of the abetment of the class with which we are here concerned, it must be shown that the accused did intentionally aid: and it must be shown that he intentionally facilitated the commission of the particular forgery.

*Babus Provash Ch. Mitter and Sushil Madhav Mullick* for the Accused.

*Mr. Orr, Deputy Legal Remembrancer* for the Crown.

*Jagabandhu's conviction and sentence set aside.*

CIVIL APPELLATE JURISDICTION. Before SHARFUD-DIN, J. APPEAL FROM APPELLATE DECREE No. 2858 OF 1907. PUNCHANAN BASU AND OTHERS, Plaintiffs, Appellants v. CHUNDI CHARAN MISRI AND OTHERS, Respondents. Heard, 2nd July. Judgment, 5th July 1909.

*Settlement of land embodied in compromise petition, if requires registration—Registration Act (III of 1877), sec. 17, cls. (b) and (h).*

The appeal was by the Plaintiffs. Their case was that in a compromise petition in a title suit No. 350 of 1903, Defendants Nos. 1 and 2 had agreed to settle with them two-anna share of the hassil and gora lands by execution of a *patta* in their favour. In that suit a decree was made in the terms of the above compromise. The Courts below dismissed the Plaintiffs' suit holding that the *solanama* was inadmissible in evidence. The Plaintiffs appealed to the High Court and the following points, *inter alia*, were urged. (1) That the lower Appellate Court erred in law in holding that the compromise decree was inadmissible in evidence in not being registered. (2) That the lower Court should have held that no registration of the compromise petition was in law necessary as it was embodied in the decree. (3) That the agreement to grant a *loan* being a consideration for a promise made by the Appellants in the previous suit to part with their two-anna *interest*, no registration of the *solanama* embodying the agreement was necessary.

It was an admitted fact that the compromise effected in suit No. 350 related also to properties which were outside that suit.

*Held*—That as under the term of the *solanama* the parties were given possession and the only thing that remained to be done was to execute *patta* and *kabuliyat*, the compromise was inadmissible in evidence for not being registered, the land of which the Plaintiff was given possession being outside the scope of the suit.

*Syed Safdar Raza v. Amsad Ali* (I. L. R. 7 Cal. 703, F. B.) followed.

*Babu Dwarka Nath Mitter* for the Appellants.

*Babu Khetra Mohun Sen* for the Respondents.

A. T. M.

*Appeal dismissed.*

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### REPORTS (See Index.)

THE DRAFT SOUTH AFRICAN CONSTITUTION WHICH according to telegraphic accounts has now passed its third reading in the House of Lords without amendment, limits the jurisdiction of His Majesty in Council to hear appeals from South Africa. The draft constitution provides that there should be no appeal from the Supreme Court of South Africa or from any division thereof to the King in Council and even the right to grant special leave to appeal is made subject to limitations which the South African Parliament may by its laws see fit to impose. The English *Law Journal* observes that such a provision is opposed to the truest interest of the proposed Federation as well as of the Empire in general. Referring to the question of the Native Franchise it asks "is it right that the determination of the difficult problems which must arise upon the electoral law, whatever may be its ultimate form, should be in the hands of some local Court and that not merely individuals but whole classes of His Majesty's subjects should not be able to bring their legal grievances before his highest tribunal?"

IT IS WORTHY OF NOTICE THAT AT THE LAST Imperial Conference the South African representa-

tives supported the proposal of the Commonwealth of Australia that an Imperial Court of Appeal should be established and they themselves presented a resolution which was accepted by the Conference "that the right of any person to apply to the Judicial Committee of the Privy Council for leave to appeal to it shall not be curtailed." We regret to note a growing tendency on the part of almost all the important self-governing Colonies under the Crown to restrict the jurisdiction of the Privy Council and we apprehend that in course of time it may result in the Privy Council being left to exercise its Appellate jurisdiction over India and some of the unimportant Colonies and Dependencies only. If there is one thing which provides the inhabitants of the distant parts of the Empire with a common bond of union with the Sovereign country, existing not only in idea but also in fact, it is the right of appeal to His Majesty in Council. A movement which tends to do away with this bond is a movement not towards decentralisation but towards disintegration and as such is to be deprecated. We hope that these provisions, or at any rate so much of them as seeks to restrict the exercise by the King in Council of his prerogative of granting special leave to appeal, will be reconsidered in the House of Commons before the draft constitution passes into law.

A QUESTION OF HINDU LAW OF CONSIDERABLE importance has been decided by Mookerjee and Carnduff, JJ., in the case of *Churaman Sahu v. Gopi Sahu*, reported at p. 994 of this issue. A Behari Hindu appears to have died in 1886 leaving a widow and an only daughter. The widow gave the daughter in marriage in 1889, and shortly after her *Awiragaman* ceremony which took place in 1891, she made an absolute gift of a little over a fourth of her husband's estate to the daughter. The question was whether the gift was one which the widow with her limited powers of alienation was entitled to make. The question was undoubtedly one of first impression and there are no texts or decisions exactly covering the point. The texts as well as judicial decisions go to show that gift of a reasonable portion of the immoveable property of the father can be properly made on the occasion of a daughter's marriage. So the

arguments on both sides practically turned on the question whether the *dwiragaman*, or *gowna* ceremony as it is called in Behar, can be regarded as a part of the marriage ceremony proper.

THE DISTRICT JUDGE, MR. L. PALIT, IS NOT, WE believe, alone, in the view he took of the matter, that the *gowna* ceremony cannot except on philosophical or sentimental grounds be regarded as part of the marriage ceremony. The quotations from books of Hindu ritual, on which the High Court relies, no doubt show that the *dwiragaman* ceremony used to be regarded in the Hindu household, and in some part of the country is still regarded, as a ceremony of some importance. But we are not convinced that it is so closely connected with the marriage ceremony proper that gifts made on such occasions can be regarded as "dowry deferred." It is remarkable that none of these authorities purport to specifically lay down that gifts of immoveable property or *bhoodanam* should be made on such occasions. It is stated at p. 1000, col. 2 of the judgment that according to the customs prevalent in Behar, gifts have to be made to the daughter on such occasions. But the nature and extent of such customary gifts are not indicated in the judgment. It is customary for a Hindu to make gifts to a daughter on various other occasions of her married life, not so intimately connected with the marriage ceremony proper. But it cannot, we presume, be argued from this that a Hindu widow may give away her husband's immoveable property on any such occasion. We are not therefore sure that if the text fail the decision can be justified on the surer ground of custom.

WE REPORT IN THIS ISSUE TWO RECENT DECISIONS by two different Divisional Benches of the High Court (*Girindra Mohun Roy Chowdhry v. Bocha Das*, p. 1004 *Abinash Chandra Bose v. Bama Bewa*, p. 1010) on the oft-mooted question whether mere abstinence to sue on the part of the creditor on default of payment of an instalment of a debt due on an instalment bond may be taken to amount to a waiver of the right of the creditor to sue for the whole amount upon such default. Both decisions are agreed in holding that it does not. In both cases the Judges declined to follow *Chand Komal v. Easasree*, 13 C. L. R. 24, and the recent decision in *Raj Narain v. Gopi Nath*, 11 C. W. N. 903, in which the last-mentioned case was accepted as authority. In the first of the two cases (p. 1004), the Judges seem to have been of opinion that upon the authorities waiver takes place only when the overdue instalment is subsequently accepted. In the other (p. 1010), it is suggested, that the waiver may take place in other ways also, "but it must in any

case depend upon a definite act or forbearance on the Plaintiff's part. This seems to represent the sounder view of the matter."

## CRIMINAL CASES OF 1904.

(Continued from p. ccliv.)

SPECIAL PROCEEDINGS.—[Section 487]. A Presidency Magistrate cannot try a person for disobedience of his own order (*Liakat v. Emperor*, 12 C. W. N. 26).

MAINTENANCE.—The Magistrate may refuse maintenance to a woman who is expelled from caste for adultery with a lower caste man (*Ponnaya v. Periya*, 31 Mad. 185).

PRIVATE PROSECUTIONS.—Theoretically all prosecutions are conducted in the name of the State, but in practice this duty is often left to the persons aggrieved who *pro hac vice* represents the Crown (*Gaya v. Bhagat*, 30 All. 525).

DELIVERY OF PROPERTY.—An order for delivery of possession on conviction under sec. 448, I. P. C., is illegal (*Soita v. Duchi*, 12 C. W. N. 269).

TRANSFER.—[*Proceedings under sec. 110*]. Such proceedings, it has been held in Allahabad, cannot be transferred outside the district where initiated (*Emperor v. Mahendra*, 30 All. 47: see also 16 All. 9 and 19 All. 291), but the unlimited power of transfer has been established in the Calcutta rulings (28 Cal. 709, 715: 11 C. W. N. ccxxxi). [*Grounds of*]. Transfer was allowed for a refusal to allow cross-examination after the charge (7 C. L. J. 249), and where, during the pendency of a *bund* cutting case, the Magistrate went to the *bund* in connection with other matters which might, however, have given rise to suspicion in the pending case (*Korban v. Azmat*, 12 C. W. N. 748). The fact that the transfer would be from an assessor to a jury district is immaterial (*Durga v. Emperor*, 8 C. L. J. 59).

IRREGULARITIES.—[*Waiver or consent*]. Except where the law permits it, there is no waiver of right by consent to procedure of admission of evidence not authorized by law. "It is the duty of all Criminal Courts to follow strictly the procedure enjoined by law, and consent cannot cure irregularities in this respect (*D. L. R. v. Upendra*, 12 C. W. N. 140; see also 2 Cal. 293: 24 W. R. Cr. 53: L. R. & P. C. 520).

[*Bad commitment*]. The section does not apply to commitments under sec. 346 (*Kamini v. Fakir*, 12 C. W. N. 136).

[*Omission of charge*]. A conviction of criminal breach of trust, in respect of money obtained by dealing with a document, on a charge relating to the document itself, is bad, as also the conviction of another accused under sec. 414 without a charge, though the accused filed a statement denying it (*Bipra v. Niradmoni*, 12 C. W. N. 577).

SEC. 537.—[*"Subject to the provisions heretofore contained"*]. These words must not be read so

as to nullify cl. (b). Want of sanction is no ground for setting aside a conviction after trial (*Perumalla v. Emperor*, 11 Mad. 80). This is in accord with 28 Cal. 126, 26 Bom. 50, 54: 29 Mad. 149 and other cases, but is opposed to 22 Cal. 176 which is not sound, or at least now obsolete.

[*Legality of warrants.*] A warrant illegally issued under sec. 96 cannot be treated as valid under sec. 98 by the operation of sec. 537. The section does not give legal effect to defective warrants, but only validates a finding, sentence or order defective in procedure (*Rash Behari v. Emperor*, 35 Cal. 1076).

WITNESSES.—The prosecutor and accused are equally entitled to a full cross-examination of witnesses called by the Court under sec. 540 (*Chintamony v. Emperor*, 35 Cal. 243).

SEC. 565 (4).—The notice of residence required from convicts under sec. 564 (2) is not to prevent the commission of any particular offence, and the failure to give such notice comes under the first part of sec. 176, I. P. C. (*Emperor v. Hussain*, 31 Mad. 348).

## II. PENAL CODE.

DEFINITIONS.—[*Public servant*]. A local board sircar is not a public servant (*Addaita v. Kali*, 12 C. W. N. 96, distinguishing 12 Bom. H. C. R. 1). [*Intention*]. To constitute an offence under sec. 231 it is not necessary that the counterfeit should be made with primary intent to pass it off as genuine: it is sufficient if the resemblance is close enough to admit of its being passed off as such (*Emperor v. Quadir*, 30 All. 93).

PREVIOUS CONVICTION.—Sec. 75 is not to be used in order to enhance the heinousness of petty offences (*Guhi v. Emperor*, 12 C. W. N. lxxiii, following 1 C. L. R. 481).

RIOTING.—PRIVATE DEFENCE.—The right of private defence is a restricted one (7 Mad. H. C. R. 4p. xxxv: *Jairam v. Emperor*, 35 Cal. 103; *Kabiruddin v. Emperor*, 35 Cal. 368). Since the last two years several important cases have been decided on the subject, and in considering them regard must be had to the circumstance that each case was determined on its own facts: (*Ram Khelawan v. Emperor*, 13 C. W. N. 826; *Jairam v. Emperor*, 35 Cal. 103, 106; *Kabiruddin v. Emperor*, 35 Cal. 368, 376). (1) [*Defence of possession or right*]. The mere use of force or show of criminal force to take possession of property is not within sec. 141 (4), unless some criminal intent accompanies it. There is no unlawful assembly where the accused removes pipes laid in the bed of their *khal* by the District Board sircar (*Addaita v. Kali*, 12 C. W. N. 96), or when the object is not to enforce a right or supposed right, but to maintain undisturbed the actual enjoyment of a right (*Silajit v. King-Emperor*, 13 C. W. N. 801), or to protect their master's right to a share of the reaped crops which would be lost by removal to the

tenants' villages (*Ram Khelawan v. Emperor*, 13 C. W. N. 826). In these cases the accused were held to have acted under the right of private defence, and not to have exceeded the right.

(2) [*Deliberate intention to enforce right by force in large numbers*]. A party entering, in large numbers, on land till then in possession of the complainant and uprooting plants, with the common object of enforcing a right or supposed right by the use of force, is guilty of unlawful assembly, and their temporary occupation does not justify their action in beating the complainant and his party (*Jairam v. Emperor*, 35 Cal. 103, approving of 16 Cal. 206, and distinguishing 24 Cal. 686 and 33 Cal. 295). There is no right of private defence where parties arm themselves for a fight to enforce their right, and deliberately engage in large numbers in a fight. In such a case if it is not shown that the accused acted within the legal limits of the right of self-defence it is immaterial who was the aggressor (*Kabiruddin v. Emperor*, 35 Cal. 368, following 35 Cal. 103, and *Re Kalu*, 1 C. L. R. 521: see also *King-Emperor v. Kaliji*, 24 All. 143; *Emperor v. Kadhu*, 24 All. 298; and *Queen-Empress v. Prag*, 20 All. 450). No right of private defence arises where a large body of men go armed and prepared for a fight to enforce their right (*Maniruddin v. Emperor*, 35 Cal. 384), even when the opposite party is the aggressor and is engaged in cutting a *bund* on the land of the accused and in his possession (*Emperor v. Ambika Lal*, 35 Cal. 443; following 35 Cal. 368 and distinguishing 23 W. R. Cr. 25; and 24 Cal. 686).

[*Section 149*]. An offence under sec. 147 is the basis of a conviction under sec. 149 read with another section. If the conviction under sec. 147 is set aside, that under secs. 149 and 324 falls with it (*Molai v. Mahomed*, 12 C. W. N. cxiv). The members of an unlawful assembly may have a certain object up to a certain time, and the criminality of each depends on the information at hand and the extent of his complicity in the common object (*Adil v. Emperor*, 8 C. L. J. 561: see also *Jahiruddin v. Queen-Empress*, 22 Cal. 306).

SEDITION.—[*Reasonable criticism*]. A reasonable criticism of the action of Government in any particular matter, without attempting to create hatred or contempt, is not, but an incitement to an insurrection is, sedition (*Emperor v. Phanindra*, 35 Cal. 945), and so is an article incompatible with the continuance of the Government established by law. It is the duty of every citizen to support the Government and to express with moderation disapprobation of its acts and measures (*Apurba v. Emperor*, 35 Cal. 141). [*Re-publication*]. The re-publication of seditious articles one of which only was filed as an exhibit in a case against its editor on a trial for sedition, is not a report of the proceedings of a Court of Justice (*Apurba v. Emperor*, supra. Cf. *Re Howard*, 12 Bom. 167).

[*Evidence of other articles*]. Seditious articles published in the same or other issues of the same newspaper, and not forming the subject of the charges, are admissible in proof of the intention or knowledge of the writer or publisher (*Emperor v. Phanindra*, supra).

[*Procedure*]. An order under sec. 196, Cr. P. C., should be expressed with strict adherence to the language of the section, but the real question is whether the prosecution is with Government sanction (*Apurba v. Emperor*, supra; *Chidambaram v. Emperor*, 32 Mad. 3). A police-officer may be complainant in such case (*ibid.*).

[*Presumption: Evidence Act, sec. 114*]. The presumption under sec. 114 supplies omissions as to the method of communication of the order of Government under sec. 196 of the Criminal Procedure Code, and defects in the order-sheet of the Magistrate (*Apurba v. Emperor*, supra).

[*Printer's liability*]. Sec. 7 of Act XXV of 1867 makes the printer liable for everything appearing in the newspaper, whoever the author may be, unless he can prove absence from its office in good faith and without knowledge that during his absence sedition will be published (*Emperor v. Phanindra*, supra; *Apurba v. Emperor*, supra: see also 9 Mad. 387 and 22 Bom. 112).

FALSE INFORMATION.—False information in a road-cess return not for the purpose of the assessment of cess but of intended use as evidence in a civil suit, is not an offence under sec. 94 of Act IX of 1880 (B. C.) (*Mahamad v. Emperor*, 12 C. W. N. cclvi). [*False charge*]. A false charge within sec. 211 must be made to one having authority to set the criminal law in motion. An information of a dacoity to a village munsif does not, therefore, come under the section (*Chinna v. Emperor*, 31 Mad. 506). An order to prosecute a person under sec. 211 for false information to the police, without notice to the informant, is not without jurisdiction, though it would be better to give him an opportunity to prove his case by evidence (*Emperor v. Tabarak*, 30 All. 52, distinguishing 8 All. 38: 29 All. 587 and 33 Cal. 30).

CONCEALING EVIDENCE.—A person charged with an offence cannot be convicted under sec. 201 (*Kashi v. Emperor*, 12 C. W. N. lxxx). This is well settled: see 5 W. R. Cr. Lett. 5: 7 W. R. Cr. 52: 8 Bom. F. C. R. 126: 8 All. 252 (and cases cited): 22 Cal. 638.

LAWFUL CUSTODY.—[*Legal custody*]. The arrest by a duffadar of a person for theft not committed in his view is illegal under Act VI of 1870 (B. C.), sec. 39 (2), and rescuing him from such custody is not within sec. 225 (*Rolai v. Emperor*, 35 Cal. 361). The escape of a prisoner, while the peon having custody of him is asleep, is an offence under sec. 225 (B) (*Public Prosecutor v. Ramaswami*, 31 Mad. 271). See also *Queen-Empress v. Muppan*, 18 Mad. 401: *Reg. v. Fojjian*, 5 Mad. 22: and cf. *Queen-*

*Empress v. Potadu*, 11 Mad. 480. [*Arrest under initialled warrant*]. A civil warrant initialled is signed according to the definition in the Civil Procedure Code and the General Clauses Act (*Jogendra v. Emperor*, 22 C. W. N. xlv: see 23 Cal. 896: 8 All. 293: 25 Mad. 61, 97: 5 C. W. N. 447).

PUBLIC HEALTH, NUISANCE.—[*Cow killing*]. The slaughter of kine by Mahomedans is legal under certain limits. It is a right independent of custom provided it is not abused (*Shahbaz v. Umrao*, 30 All. 181). The question has been considered in 7 Mad. 590, 12 Bom. 437, 10 All. 44, *Ibid* 150: 17 Cal. 852 and 25 W. R. Cr. 70. [*Adulteration*]. The adulteration of ghee with vegetable oil, in the absence of proof of its being noxious or injurious to health or unwholesome, is not an offence under sec. 273 (*Chokraj v. Emperor*, 12 C. W. N. 608).

MURDER.—GRIEVOUS HURT.—Where the accused pursued the complainants for a long distance and attacked them when they were in their power and killed several, the act is murder and not within sec. 300, Excep. (4) (*Adil v. Emperor*, 8 C. L. J. 561). The administration of *dhaturo* to facilitate a robbery is an offence under sec. 325 as to those who died from its effects, but under sec. 328 as to those who survived (*Emperor v. Bhagwan*, 33 All. 568, not following 20 All. 143). Under sec. 326 the act must be done "voluntarily" (*Emperor v. Khudiram*, 12 C. W. N. 530).

THEFT AND CRIMINAL BREACH OF TRUST.—Running water not reduced to possession cannot be the subject of theft (*Emperor v. Sheikh*, 35 Cal. 437, distinguishing 11 Q. B. D. 21). A partner is entitled to be called upon for an account of the partnership money received by him, and he cannot be convicted under sec. 406 until this is done (*Debi v. Nagar*, 35 Cal. 1108).

E. H. MONNIER.

(To be continued.)

## CURRENT INDIAN CASES.

KEDAR SINGH v. NATABADAL SINGH, I. L. R. 31 All. 44. *Suit—Valuation—Redemption*.

In a suit for redemption of mortgage the value is the value of the principal mortgage money.

JAGAR NATH v. SHEO GHULAM, I. L. R. 31 All. 46. *C. P. C. (Act XIV of 1882), sec. 244*.

In an execution of a decree for sale of a specific mortgaged property the representative of a judgment-debtor cannot raise the question as to the competency of the mortgagor to make the mortgage and therefore a separate suit for that purpose is maintainable.

KANHAI LAL v. CHHADAMMI, I. L. R. 31 All. 48. *Cr. P. C., sec. 195*.



Only one appeal lies against an order granting sanction to prosecute under sec. 195, C. Cr. P.

**SAGAR MAL v. MAKHAM, I. L. R. 31 All. 49.** *Agra Tenancy Act—Tenant.*

Under the Agra Tenancy Act the holder of a rent-free holding is not a tenant.

**JAGANNATH v. DIBBO, I. L. R. 31 All. 53.** *Hindu law—Reversioner.*

A Hindu reversioner cannot transfer his reversionary interest.

**KHANDHYA LAL v. MANKI, I. L. R. 31 All. 56.** *Contract Act, sec. 129.*

A person becoming a surety for an administrator for administration of the estate cannot withdraw from his suretyship of his own accord.

**CHOGA LAL v. PUJARI, I. L. R. 31 All. 58.** *Immoral purpose—Contract.*

A landlord letting a house to a prostitute to carry on prostitution cannot recover rent.

**BHAGWATI v. BANWARI LAL, I. L. R. 31 All. 82.** *C. P. C. (Act XIV of 1882), sec. 244.*

The term "representative" under sec. 244, C. P. C., includes a purchaser of the judgment-debtor's interest, who, so far as such interest is concerned, is bound by the decree. Sec. 244, C. P. C., places the representative in the same position as the decree-holder.

## Review.

THE INDIAN LIMITATION ACT, being Act No. IX of 1908 with Full Notes. By Sarat Chandra Ghosh, B. L. Vakil, High Court, Calcutta. Part I. Calcutta: Printed and published by the Commercial Press, 3, Hastings Street. 1909. Price of this part Re. 1-4.

This is the first instalment of an annotated edition of the New Limitation Act. So far only the section portions have been dealt with. But the manner in which this has been done leaves little room for doubting that when completed the book will prove a very useful aid to legal practitioners. The notes are up-to-date and appear to be the result of a first-hand study of the reports, and are also fairly well arranged. The industry and care which the author has brought to bear on the preparation of this compilation will, we have no doubt, receive due recognition from the profession. The Object and Reasons of, and the Report of the Select Committee on, the Limitation Bill of 1908 fittingly find a place at the beginning of the first annotated edition of the Act so far presented to the public.

## Notes of Cases.

### ENGLISH LAW COURTS.

**KING'S BENCH DIVISION.**—*Provincial Motor Cab Coy. v. Dunning* (through *Kynaston*). Before the LORD CHIEF JUSTICE and JUSTICES JELF and SUTTON. 9th June 1909.

*Motor-car regulation—Breach—Offence, knowledge if necessary to—Abetment—Knowledge of principal, if need be proved—Offence by servant—Abetment by employee company.*

This was an appeal on behalf of the Defendant who had been found guilty of the offence of aiding and abetting the driver to use a motor-car on the highway the back number of which was not illuminated as required by the Motor Car Act. One of the contentions was that no knowledge on the part of the principal was proved. Hence his conviction for abetment was illegal. Reference was made to *Reg. v. Taylor* (L. R. 2 C. C. R. 149); *Reg. v. Coney* (8 Q. B. D. 557); *Callow v. Tillstone* (83 L. T. 411).

The LORD CHIEF JUSTICE in dismissing the appeal held that the statute was passed for the protection of the public, and that no guilty knowledge or intent of the principal was required to be proved. There was sufficient evidence that the car was sent out by persons for whom the Appellant was responsible in a condition which did not comply with the law.

JELF and SUTTON, JJ., concurred.

*Appeal dismissed.*

## CALCUTTA HIGH COURT.

### Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

**CRIMINAL REVISIONAL JURISDICTION.** Before JENKINS, C. J., and CASPERSZ, J. **CRIMINAL REVISION No. 655 of 1909.** **DHARMA NAIK AND ANOTHER, Petitioners v. THE EMPEROR, Opposite Party.** 20th July 1909.

*Security for good behaviour—Further enquiry—District Magistrate's power to order—Criminal Procedure Code (Act V of 1898), sec. 110.*

Proceedings were instituted against the Petitioners in the Court of the Deputy Magistrate of Puri under sec. 110 of the Code of Criminal Procedure calling upon them to shew cause why they should not be bound down to be of good behaviour as they were reported to be thieves by habit. The main evidence in the case against the Petitioners was that a very large number of clothes and some valuables were found in their house when it was searched in connection with a theft in the house of a Munsif in the place. The Petitioners were Municipal sweepers and their defence was that the clothes were obtained from the dead bodies of

pilgrims which they in their capacity as Municipal sweepers had been employed to dispose of. The Deputy Magistrate by his judgment held that "the charge that the accused are thieves by habit has been proved in my opinion and it is ordered that each of them do furnish security in two sureties of Rs. 50 each and execute recognisance bond for Rs. 100 for one year's good behaviour, in default rigorous imprisonment is awarded for the period of default." On appeal the District Magistrate of Puri held that "mere general evidence and suppositions are hardly sufficient in such a case. The order for security is cancelled and the proceedings are remanded for further enquiry. The original proceeding should be amended by the insertion of a clause as regards habitual receipt of stolen property." Against this order of the District Magistrate the Petitioners moved the Sessions Judge of Cuttack who by his order, dated 4th May 1909, directed the parties to go to the High Court direct.

The Petitioners thereupon moved the High Court and obtained this rule on the District Magistrate of Puri to show cause why the order for further enquiry passed by him should not be set aside on the ground that he had no jurisdiction to do so after setting aside the order for security under sec. 110, Cr. P. C.

*Babu Atul Krishna Ray*, Vakil for the Petitioners, contended that the order for further enquiry in a sec. 110 case was without jurisdiction. Sec. 437 of the Criminal Procedure Code does not confer such power on a District Magistrate, and as that is the only section which authorises a District Magistrate to direct further enquiry, the order passed was illegal and should be set aside.

Referred to *Queen-Empress v. Imam Mandal*, I. L. R. 27 Cal. 662; s. c. 6 C. W. N. 163, and *Dayanath Taluqdar v. Emperor*, I. L. R. 33 Cal. 8.

Their Lordships held, following the ruling reported in I. L. R. 33 Cal. 8, that the order directing further enquiry by the District Magistrate was illegal.

•• B. C.

**CIVIL APPELLATE JURISDICTION.** Before STEPHEN and CHATTERJEE, JJ. APPEAL FROM ORIGINAL ORDER No. 384 of 1907 AND RULE No. 3028 OF 1907. *KEDAR BANS LAL MISSEK*, Petitioner, Appellant *v.* *MAHARANI JANAKI KOER*, Opposite Party, Respondent. 12th July 1909.

*Civil Procedure Code (Act XIV of 1882), sec. 351—Certificate under Public Demands Recovery Act—Application for insolvency—Rejection—Appeal.*

An application was made for declaration of insolvency on the basis of a certificate under the

Public Demands Recovery Act. The Court below refused the application on the ground that he had no jurisdiction to act in the matter, because the debts put forward by the applicant were debts which had been certified and in part recovered under the provisions of the Public Demands Recovery Act.

*Held*—There is nothing in sec. 19 of the Public Demands Recovery Act to limit the jurisdiction of the Civil Court in any matter arising under the Act.

That proceedings taken by the insolvent debtor for his own relief could not be regarded as in any way enforcing or executing the liabilities which he has incurred under the Act.

That no appeal lay from the order wrongly rejecting an application by the insolvent, on the ground that he (the Judge) had no jurisdiction to entertain it. The order of rejection in order to be appealable must be a rejection on the merits of the case.

*Babu Narendra Kumar Bose* (for *Babu Jnanendra Nath Bose*) for the Appellant.

*Babus Ram Churn Mitter* and *Nalin Ranjan Chatterjee* for the Respondent.

*Appeal dismissed:*

*Rule made absolute.*

A. T. M.

**CIVIL APPELLATE JURISDICTION.** Before STEPHEN and CHATTERJEE, JJ. APPEAL FROM ORIGINAL DECREE No. 106 of 1908. *BABU SASHI SHEKHAR SINGH*, Plaintiff, Appellant *v.* *THE HON'BLE MAHARAJA SIR RAM-ESHWAR SINGH BAHADUR*, Defendant 1st Party, Respondent. 15th July 1909.

*Transfer of Property Act (IV of 1882), sec. 85—Mitakshara family—Person not born at the time of execution of deed but born before institution of suit if a necessary party—Effect of not making a party.*

The appeal was from an order refusing a prayer for an injunction to prevent the Defendant in the suit from proceeding with an execution. The facts were as follows:—The Plaintiff was the grandson of Durga Dutt Singh who in 1892 executed a mortgage in favour of the Defendant-Respondent, who obtained a decree in respect of the principal and interest on the said mortgage on the 29th March 1901, and subsequently instituted the execution proceeding to enforce his rights under the decree. The Plaintiff was born after the execution of the mortgage and before the institution of the suit. His case was that he was entitled to bring a suit impugning the validity of the mortgage on various grounds and that he was not bound by the decree in question because he was not made a party to the mortgage suit as he ought to have been under sec. 85 of the Transfer of Property Act.

*Held*—That as the Plaintiff had an interest at the time of the institution of the suit and as he was not made a party under sec. 85 of the Transfer of Property Act, he was not bound by the former decision and that he was entitled to the injunction prayed for.

*Lala Surja Prosad v. Golab Chand* (I.L. R. 28 Cal. 517) distinguished.

*Babus Umakali Mukerjee and Joy Gopal Ghosh* for the Appellant.

*Babu Ram Churn Mitter* for the Respondent.

A. T. M.

*Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before STEPHEN and VINCENT, JJ. APPEAL FROM APPELLATE DECREE NO. 1520 OF 1907. SRIMATI NIRODE MOHINI DAS, Appellant *v.* SHIBADAS PAL DEWASIN AND OTHERS, Respondents. Heard, 28th June. Judgment, 8th July 1909.

*Pala, alienation of, validity of.*

The Plaintiff-Respondent sued for certain shares in the pala of a Thakur's sheba and in the property appertaining thereto. His claim was based on an *arpannamah* executed in his favour by three of the Defendants, Nos. 5, 6 and 7. He was 8 annas owner of the property in dispute, had a reversionary interest in  $\frac{1}{2}$  of the remainder; and was the maternal uncle of Defendants Nos. 5 to 7. It was asserted in the plaint that the Plaintiff, owing to his place of residence and other advantages, could perform the sheba of the Thakur much better than Defendants Nos. 5 to 7, and that this was a reason for the *arpannamah*.

The lower Appellate Court, relying on the decision in *Mancharam v. Branshanker* (I. L. R. Bom. 298) held that the office of shebait was alienable by Defendants Nos. 5 to 7 and that the Plaintiff acquired a good title under the *arpannamah*.

*Held*—That the decision was correct.

*Rajessur Mullik v. Gopessur Mullik* (11 C. W. N. 782; s. c. I. L. R. 35 Cal. 226) explained.

*Khettur Chandra Ghose v. Hari Dhs Bandopadhyaya* (I. L. R. 17 Cal. 557) and *Rajaram v. Gonesh* (I. L. R. 33 Bom. 31) referred to.

*Babu Kshetra Mohan Sen* for the Appellant.

*Babu Nalini Ranjan Chatterjee* for the Respondents.

A. T. M.

*Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before STEPHEN and CHATTERJEE, JJ. APPEAL FROM ORIGINAL DECREE NO. 340 OF 1907. MUKTI NATH JHA AND OTHERS, Defendants Nos. 5 and 6, Appellants *v.* CHANDRA NATH JHA AND OTHERS, Respondents. 19th July 1909.

*Parol usufructuary mortgage before Transfer of Property Act—Validity.*

The Plaintiffs brought a suit on a simple mortgage bond executed by Defendants Nos. 1 to 4 in their favour in 1891. Defendants Nos. 5 and 6 objected to a mortgage decree being passed against them on the ground that ancestors of the mortgagor borrowed money and executed three *chittis* in favour of their ancestors in 1876 and 1878 and delivered possession to them of a portion of the mortgaged properties and since then they have been holding possession of the said land enjoying the usufruct in lieu of interest for the money advanced. The first Court held that the *chittis* did not constitute usufructuary mortgage and impounded them and held that Defendants Nos. 5 and 6 have no right as usufructuary mortgagees and gave the Plaintiffs a decree. The Defendants Nos. 5 and 6 appealed to High Court. It was argued on their behalf that (1) before the passing of the Transfer of Property Act parol mortgage was valid under Hindu and Mahomedan Law and the Registration Act of 1872 and 1877 did not affect such mortgages, and as the Defendants had been in possession of these lands since 1876 and 1878 in lieu of interest for the money advanced they are usufructuary mortgagees and have priority over the Plaintiffs' mortgage. The Respondents contended that as they had no notice of such mortgage and as they were required to be in writing and registered they were invalid and not binding on them. *Held*:—The Defendants Nos. 5 and 6 having been in possession of the lands from before the passing of the Transfer of Property Act, they were in the position of usufructuary mortgagees created by parol agreement and their mortgage would not be affected by Plaintiffs' subsequent mortgage and the properties covered by the usufructuary mortgage could only be sold subject to the right of Defendants Nos. 5 and 6.

*Babu Kshetra Mohan Sen* for the Appellants.

*Babu Baldeo Narain Sing* for the Respondents.

A. T. M.

*Appeal decreed with costs.*

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and VINCENT, JJ. APPEAL FROM APPELLATE ORDER NO. 601 OF 1908. BHUPENDRA NATH CHATTERJEE, Auction-purchaser, Appellant *v.* UPENDRA NATH GANGOPADHYA, (Petitioner) and AMBICA CHARAN MUKERJI, (Decree-holder) AND OTHERS, Respondents. 23rd July 1909.

*Civil Procedure Code (Act XIV of 1882), sec. 244—Representative—Decree against registered tenant—Effect on unregistered transferee.*

The appeal, which was preferred by a purchaser at a sale in execution of a decree for arrears of rent, was directed against an order setting aside the sale. The sale which was reversed took place

on the 20th February 1906. On the 13th November following the present Respondent made an application to set aside the sale on the ground of fraud and irregularity. The title which was set up by him was based on a purchase at a sale in execution of a mortgage decree on the 16th November 1903. The Court of first instance found that the property was not transferable and therefore the applicant had no *locus standi* under secs. 244 and 311, C. P. C. Upon appeal, the Subordinate Judge held that as rent was received from the Respondent by the landlord on the 24th June 1906, he was recognised as a tenant and was consequently entitled to maintain the application. On the merits, it was held that the sale was vitiated by fraud and it was consequently reversed.

The auction-purchaser appealed to the High Court and on his behalf it was contended, *inter alia*, that the applicant had no *locus standi* because his purchase at the mortgage sale took place on the 19th November 1903, that is long before the rent suit was instituted, and that consequently he was not a representative of the judgment-debtor and was not entitled to make an application under sec. 244, C. P. C.

*Held*—Where the landlord of an occupancy-holding obtained a decree against the registered tenant, an unregistered transferee of the tenant into whose lands the holding passed in whole or in part is bound by the decree and is therefore a representative of the judgment-debtor within the meaning of sec. 244, C. P. C.

*Aagar Ali v. Asabuddin Kazi* (9 C. W. N. 134) and *Srimoti Nisa Bibi v. Radha Kishore Mukaya* (11 C. W. N. 312) relied on.

*Babu Jodu Nath Kanjilal* for the Appellant.

*Babu Bidhu Bhushan Ganguly* for the Respondents.

A. T. M.

*Case remanded.*

CIVIL APPELLATE JURISDICTION. Before RICHARDSON, J. APPEAL FROM APPELLATE DECREE No. 2484 OF 1907. BANKU BEHARYSARKAR, Plaintiff, Appellant *v.* BENODE KUMAR PAL, Defendant, Respondent. 4th August 1909.

*Raiyati right can be acquired in a share of a holding.*

Raja Ram Ranjan Chakrabarti and Anath Nath Deb are co-sharer landlords of a certain village, the former owning 12 as. and the latter 4 as. share. Chowkidari Chakran lands of the village having been settled with the aforesaid landlords, the Raja settled his 12 as. share of the chakran lands with one Tara Prosanno Banerjee while Anath Nath settled his 4 as. share of the chakran lands with

the Defendant for 9 years. The tenants after getting their leases partitioned the land amongst themselves and were holding possession. After the expiration of nine years Anath Nath settled his four annas share of the chowkidari land to the Plaintiff who not being able to get possession sued for recovery of possession. The defence was that he has at least a non-occupancy right in the land and under sec. 45, Bengal Tenancy Act (before amendment), was entitled to a notice of six months before the expiry of the lease and is not liable to be evicted now. Both Courts held that no notice was served and Defendant cannot be ejected. The Plaintiff appealed and it was contended on his behalf that sec. 45, Bengal Tenancy Act, does not apply as the lease was of a share in land and no occupancy or non-occupancy right can be acquired in a share of a holding, 1 C. W. N. 521, 2 C. W. N. 44, 680, 2 C. L. J. 10, cited. For the Respondent it was argued that the cases cited relate to sections where the word holding is used which does not occur in sec. 45; that there can be rayati right although the subject of tenancy may not be undivided parcels of land, 3 C. L. R. 140; that the definition of the word "tenant" and the different classes of tenants as stated in secs. 4 and 5 clearly show this; that the word "raiya" includes his "partners" and as there can be several raiyats in one piece of land so there can be separate leases of undivided shares from several co-sharer landlords by one person who would hold separate tenancies as raiya under each of the landlord; that under the general law also the tenant was entitled to notice to quit; further that in this case the tenants partitioned the land and were in separate possession and the Plaintiff in his plaint stated he had no objection to possession being given to the lands which the Defendant was holding on partition with the tenant of the 12 as. malik.

*Held*—Regard being had to the definition of tenant and raiya and the different classes into which tenants are divided there can be raiya interest in an undivided share or parcels of land. That sec. 45, Bengal Tenancy Act, applies to such tenants.

*Babu Nalini Ranjan Chatterjee* for the Appellant.

*Babu Kshetra Mohun Sen* for the Respondent.

A. T. M. *Appeal dismissed with costs.*

# THE Calcutta Weekly Notes.

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MONDAY, AUGUST 16, 1909.

[No. 40]

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### REPORTS (See Index.)

THE FOURTH CRIMINAL SESSIONS OF THE HIGH COURT for the present year commences its sittings from date.

WE ARE GLAD THAT THE SELECT COMMITTEE HAS included sec. 19 of the Bombay Police Act in the Calcutta Police Bill and made some other material improvements in it for guarding against vexatious interference with some of the obvious rights and liberties of the subject by petty police-officers under some of the more objectionable clauses of the Bill. Of all the provisions in this new Police Bill, cl. 14 and its various sub-clauses which confer on the Police Commissioner discretionary powers of prohibiting public meetings, assemblies, speeches, processions, songs, cries, &c., by public notification or order in writing, and the indemnity clause (23 of the Bill) which seeks to indemnify all police-officers in respect of acts done or intended to be done in good faith or intended pursuance of some duty, authority or orders under the Act, are open to the most serious objection.

THE DISCRETIONARY POWERS SOUGHT TO BE conferred on the Police Commissioner by cl. 14 are wholly unnecessary because the Magistrates have ample powers under the Code of Criminal Procedure to prevent any of the things contemplated in this clause on an application being made to him and supported by sworn testimony. All that the Police need do is to be on the alert and make timely application before a Magistrate. The powers sought to be conferred on the Police Commissioner are really the Magisterial powers without requiring

him to conform to the legal formalities and thus amount to giving him a licence to exercise those powers at his absolute and uncontrolled discretion. The powers under cl. 14, therefore, not only seriously trench upon the ordinary rights of citizens, but also seeks to replace the judicial discretion of a Magistrate by the arbitrary discretion of an executive officer and as such is open to very serious objections.

AS REGARDS THE INDEMNITY SECTION THE expression "good faith" and "intended pursuance" are much too wide to ensure the degree of care and caution that a police-officer should always exercise in the discharge of his responsible duties. Emphatic protests have been made in the public press and also by public bodies and non-official members of the Bengal Council regarding these and other objectionable clauses in the Bill. It seems to be conceded on all hands that since the Bill has not been submitted to any responsible law officer of the Crown or to the High Court for opinion, it ought to stand over, and under the circumstances we think that the Government will not be well-advised in rushing the Bill through the Council in the face of such unanimity of opinion.

NOW THAT THE INDIAN COMPANIES ACT IS BEING amended, we would suggest that the Indian Legislature may at the same time usefully frame a Bill for the formation and registration of Limited Partnerships. The English Companies Consolidation Act of 1908 permits the combination of limited and unlimited liability, which is the very essence of Limited Partnerships. But even if the new Indian Companies Act would incorporate in it this provision of the English Act, we would maintain that much useful purpose would be served in India by the passing of a separate Limited Partnerships Act on the lines of the English Act of 1907.

WE HAVE OFTEN HEARD OF THE DESIRABILITY of requiring the registration of partnerships by legislation. The bulk of the business firms in India are partnership firms and it would be a great security to all business-men to be in a position to know who are the people who actually compose the firm and the extent of their respective interests

in the same. However desirable this may be from an outsider's point of view the members constituting the firm may quite feasonably object to a law which would require the fullest disclosure regarding the constitution and position of their firm against their will so long they are prepared to take upon themselves the fullest liability of their dealings and transactions. They may say that so long as the legislature cannot compel private persons engaged in business to disclose the details of their business concern it cannot with any propriety insist on two or more persons engaged in business disclosing all the particulars of their firm.

BUT IT WOULD BE DIFFERENT WITH BUSINESS CONCERNS the members whereof are permitted by the Legislature to limit their liability in any manner. Having conferred this privilege on them, the State has to safeguard also public and private interests by requiring all such limited partnerships to be registered. These limited partnerships afford considerable facilities to small groups of men for associating themselves for trade or manufacture without going into the expense of forming a joint stock company. Under the existing partnership law in India the liability of all the partners is equally unlimited. But under limited partnerships the liability of any member may be limited to the extent of the capital he contributes, if he chooses to be what is usually styled a "sleeping" partner.

THERE ARE MANY PEOPLE WHO HAVE NO TIME, leisure, inclination or capacity for carrying on or managing a partnership business, and for such people the law of limited partnership will afford opportunities of usefully employing their capital and limiting their risk to the extent of their contribution in the business. The obvious advantage of such limited partnerships may largely replace the present unknown and unknowable partnership firms which abound in this country. As limited partnerships will have to be registered, businessmen will be able to ascertain their constitution, position and other details from the registrar for a small fee and this will be a source of considerable convenience and great security to the public in dealing with such concerns. This might in course of time lead to the registration of a great many partnerships and the object of those who desire to see all partnership business registered may thus be indirectly gained.

#### CRIMINAL CASES OF 1908.

(Continued from p. cclviii).

**CHREATING.**—Where the accused falsely representing himself to be a member of a firm induced

a pleader to write a letter to another firm cancelling a contract, but the pleader before its despatch discovered the true facts and did not send it, held that the offence under secs. 411, I. P. C., was made out (*Mahadeo v. Dhonraj*, 12 C. W. N. 75).

**MISCHIEF.**—The cutting of an embankment to draw away water is an offence under sec. 430 (*Emperor v. Sheikh*, 35 Cal. 437). Placing a large quantity of bricks on a public road is not an offence under sec. 431: but *semble*, the case came within sec. 283 (*Fugal v. Emperor*, 12 C. W. N. 74). The breaking down of boundary pillars set up by a public servant under the Collector's orders and removing the materials is an offence within sec. 434 (*Bansi v. Emperor*, 12 C. W. N. 438, 439).

**CRIMINAL TRESPASS.**—[*Civil trespass*]. Trespass on land or in a house under a *bona fide* belief and claim of right is not an offence (*Jura Khan v. Emperor*, 7 C. L. J. 238). Where during the absence of the complainant the accused took possession of her house and established there the alleged adopted son of the complainant's father, the trespass was held to be a civil not a criminal one (*Sita v. Docthi*, 12 C. W. N. 269). So where the accused claimed to hold under the Court of Wards and had got a decree against the complainant's predecessors, but the Magistrate found that the lease had expired and a settlement made with the complainant (*Re Bilash*, 12 C. W. N. lxxvi), or where he enters upon land and drives the complainant away under a claim of purchase at a Civil Court auction sale and possession since (*Madhuram v. King-Emperor*, 12 C. W. N. cliii).

[*Intention and knowledge*]. In the case of an entry into a house by a person to search for stolen property belonging to him, in spite of the remonstrances of the complainant, held per Geidt, J., that the natural consequences of the search, against the complainant's protests was to cause annoyance which was a result the accused knew would follow. *Per Woodroffe, J.*, that there was no justification for the search (*Barfale v. Emperor*, 12 C. W. N. cxxxv). The view of Geidt, J., is no doubt in accordance with 26 Bom. 558, but this case is wrongly decided. The true construction of the section is that adopted in *Queen-Emperor v. Rayapada Yachi*, 19 Mad. 240. Geidt, J., entirely ignored the considerations on which the Madras case was based.

**FORGERY AND USER.**—The preparation of a false receipt of documents by a person actually made over by him to another purporting to be given by that person is not forgery or dishonest using (*Ram Prosad v. Emperor*, 12 C. W. N. 1113). The mere filing of a document in Court without tendering it, is not user under sec. 471 (*Ambika v. Emperor*, 35 Cal. 820).

**FALSIFICATION.** The making of false entries to conceal a previous fraudulent or dishonest acts falls within sec. 477A, as the intent is to defraud

(*Emperor v. Rash Behari*, 35 Cal. 450). See 22 Cal. 313 and 1 Weir 554 to the same effect, but contra 5 All. 221 : 8 All. 653 : 13 Cal. 349.

**FALSE PROPERTY MARK.**—Books are "goods" within the Merchandise Marks Act (*Raghavalu v. Sundra*, 31 Mad. 512 : *Ka Rai v. Radha*, 26 Cal. 232). To constitute an offence under sec. 482, the mark must be reasonably calculated to cause belief of its being the manufacture or merchandise of a person to whom they do not belong (*Raghavalu v. Sundra*, supra).

**DEFAMATION.**—An accused is privileged in respect of questions put in good faith to defend himself (*Pachai v. Dasi*, 31 Mad. 490), but not for a defamatory remark uttered maliciously (*Hayes v. Christian*, 15 Mad. 414). A party receiving a notice is entitled to reply and state his reasons, provided it is confined to the matter in hand and is relevant and is not published (*Pachai v. Dasi*, 31 Mad. 490). The administration of justice is a matter for fair and *bona fide* discussion, but newspapers must differentiate between comments and allegations of fact, in which latter case either truth or privilege must be established. An imputation of a criminal offence is not a fair comment (*Barrow v. Hem*, 35 Cal. 495).

E. H. MONNIER.

(To be continued.)

## Review.

**LIMITED PARTNERSHIPS Act, 1907**, with notes and commentaries. By T. J. C. Tomlin, M.A., B.C.L. (Oxon), Bar-at-law & A. Andrewes Uthwatt, B.C.L. (Oxon), Bar-at-law. Sweet & Maxwell Ltd., London.

This work has been issued as a supplement to Lord Lindley's treatise on the Law of Partnership. The statute is a short Act of seventeen sections. The authors have given the history of the Act and explained its scope and utility in a very lucid introduction. The notes appended to the sections are ordinarily brief and well arranged but where necessary these assume the dimension of commentaries. In such commentaries the authors seem to have spared no pains in placing before the reader all the information that he may reasonably expect to find in a work of this kind. As an instance of this we may point to the matter appended to sec. 6, cl. (3). We do not share the opinion of those who seem to think that because of the comprehensive character of the Companies Consolidation Act of 1900 the Act of 1907 under review is not likely to flourish. We believe, as we have tried to explain in our editorial columns, that the Limited Partnerships Act has quite a distinct scope of its own, and if introduced in a country like India, is likely to serve much useful purpose.

## CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

**CRIMINAL REVISIONAL JURISDICTION.** Before COXE and RYVES, JJ. CRIMINAL REVISION No. 767 OF 1909. AMAR ALI, Petitioner v. BHATTOO, Complainant. 19th July 1909.

*Charge*—Not specifying which of two similar acts prisoner is accused of—Defect in the charge, vitiating conviction.

The prosecution story was that the Petitioner went to the complainant's house and asked for the loan of a *kodali* from the complainant's servant. The servant told the Petitioner that there was no *kodali*. The accused then entered the house and asked the complainant himself. On the complainant's refusal the accused caught hold of him and began to pull him about. After this the accused went back to the zemindari kutchery and brought with him 4 peons. They, it was alleged, entered the complainant's house by breaking down a side wall and broke his cooking pots and committed some other mischief. The charge framed against the Petitioner was that he committed the offence of criminal trespass in order to commit an offence punishable with imprisonment. The Petitioner was convicted of an offence under sec. 451, I. P. C., and sentenced to a month's rigorous imprisonment. On appeal the conviction and sentence were upheld. The Petitioner then obtained this Rule.

Their Lordships observed :—

"It is clear therefore that two distinct actions are alleged against the accused : First, his tussle with the complainant, and, secondly, his entrance into the house of the complainant with four zemindar's peons and committing mischief. The charge is that the Petitioner committed the offence of criminal trespass in order to commit an offence punishable with imprisonment. The Petitioner is charged with only one offence and it is impossible to understand from the charge, of which of his two actions the Petitioner is accused. His first entrance into the complainant's house was clearly perfectly innocent, and was not with the intent to commit any offence of any kind. But it is impossible to say that the charge is clearly intended to refer to the second occurrence." Their Lordships then remarked that the judgments of the two lower Courts did not show of which of his two actions the Petitioner was convicted and that the conviction and the sentence could not under the circumstances be sustained.

Mr. K. N. Chaudhuri with Babu Jogendra Nath Mukherjee for the Petitioner.

Rule made absolute.



**CRIMINAL REVISIONAL JURISDICTION.** Before COXE and RYVES, JJ. CRIMINAL REVISION No. 808 OF 1909. GONESH CHANDRA MITRA AND OTHERS, 2nd Party, Petitioners v. NADER ALI MUNSHI, 1st Party, Opposite Party. 20th July 1909.

*Criminal Procedure Code (Act V of 1898), sec. 144 (5)—Successive orders under—Legality.*

In this case the Sub-divisional Magistrate of Uluberiah passed an order under sec. 144, Cr. P. C., on the 4th May, 1909 forbidding the second party to hold a hat at Markar on certain days of the week on which the first party held his hat at Baksi. On the 2nd July following another order was made by said officer against the second party in almost similar terms. The Rule was obtained on the ground that the latter order was really an evasion of the provisions of sub-sec. (3) of sec. 144 and was thus made without jurisdiction. In his explanation the District Magistrate stated that an application had been made on the 7th July to the Local Government through the Divisional Commissioner for extension of the original order, and the Sub-divisional Magistrate in his explanation observed that as it might take him to obtain the sanction as also to institute proceedings under sec. 107, C. Cr. P., and to conclude the same, a fresh order under sec. 144 had been passed on the 2nd of July, in order to prevent a breach of the peace.

Their Lordships in making the Rule absolute observed in the course of their judgment: "An order under sec. 144, sub-sec. (5) remains in force for only 2 months from the date of the making thereof and in case of continuing danger and continuing evil, it is reasonable to suppose that this period of 2 months was prescribed as a temporary prevention of the danger or evil which might give the Magistrate time to take steps of a more permanent character for securing the peace of the District. But here although the first order was made on the 4th May, we find that no action was taken to deal effectively with the danger until just before the close of the period covered by the order and that that action was taken not on the initiative of the Magistrate but on the application of the opposite party. . . . Under the Charter Act, we have the power to review orders under sec. 144 if they are passed without jurisdiction. It is argued that if there is a fresh police-report or fresh information a Magistrate has jurisdiction to pass a second order under that section. But reading sub-sec. (5) it seems clear to us that it is intended that subject to all just exceptions, only one order can be passed to remove the same danger. Even in this case, if the Magistrate had immediately after passing his first order taken steps to bind the parties down under sec. 107, C. Cr. P., or to obtain the orders of the local Government and could assure us that that order would probably be obtained in

a few days, this Court might very possibly decline to interfere. But when nothing has been done until the close of the period we should have no hesitation in interfering. It cannot, we think, be said that a Magistrate has jurisdiction to pass successive orders under the section. . . . If he has jurisdiction to pass two orders he clearly has jurisdiction to pass several. In that case, he might without the possibility of interference by this Court pass orders under the section extending over a considerable period of time. . . . If there is really a very serious danger of a breach of the peace, which cannot otherwise be prevented a Magistrate has under secs. 107 and 114 ample power to deal with it. But, in our opinion, the order which is now complained against is beyond the jurisdiction of the Magistrate and must be set aside."

*Mr. Buckland and Babu Narendra Nath Bhuttacharya* for the Petitioners.

*Mr. P. L. Roy and Babu Joykish Chandra Hazra* for the Opposite Party.

N. G.

*Rule made absolute.*

**CIVIL APPELLATE JURISDICTION.** Before MOOKERJEE and VINCENT, JJ. APPEAL FROM ORIGINAL DECREE No. 346 OF 1907. KAILASH CHUNDER DAS, Defendant, Appellant v. NETYANANDA DAS, Plaintiff, Respondent. 27th July 1909.

*Partition—Joint estate, portion of—Suit, maintainability of.*

The suit was for partition of joint properties. One of the objections urged on behalf of the Appellant was that the Subordinate Judge ought not to have directed a partition till the Plaintiff had included in the suit properties jointly owned by the Plaintiff and the Defendant as well as other parties.

*Held.*—A suit for partition of a portion of a joint estate is maintainable when such portion is the only property held jointly by the Plaintiffs and Defendants, although the Defendants may be jointly interested with persons other than the Plaintiffs in the remaining portion of the estate. This is merely a recognition of the elementary principle that a suit for partition, properly framed, does not include within its scope a property in which some only of the parties are interested as owners.

*Radhakanta Shaha v. Bipra Das Roy* (1 C. L. J. 40) and *Jogendra Chandra Shaha Chowdhury v. Sris Chandra Shaha Chowdhury* (S. A. 1788 of 1907, decided by Brett and Fletcher, JJ.) followed.

*Babu Sarat Chandra Bysack* for the Appellant.  
*Babus Nilmadhub Bose and Rajenara Chandra Guha* for the Respondent.

A. T. M.

*Appeal dismissed.*

# THE Calcutta Weekly Notes.

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### REPORTS (See Index.)

AMONGST THE NOTES OF ENGLISH DECISIONS published in this issue, *Hillyer v. Governor of St. Bartholomew's Hospital* is interesting as defining the status of physicians and surgeons employed in hospitals. The Trustees or Governing Body of the hospital may employ them and remunerate them by salary but they are in no sense the servants of the Governors or Trustees. The Governors cannot dictate to them their duties. As professional men they must have the fullest liberty of exercising their skill according to their own judgment. We have no hesitation in saying that this is the right view to take of qualified professional men. The reasoning given in the American decision on which this English decision is based is both clear and convincing and as such is deserving of attention.

WHAT SEEMS TO KEEP THE JUDGES OF ENGLAND always up to the mark is the public and

professional criticism of their judicial utterances. Mr. Justice Phillimore, in a recent trial in which a woman was charged with murdering an illegitimate child, in addressing the jury had observed that it had long been a practice of the Home Office not to hang women in such cases. This was objected to as amounting to directing the jury to convict the accused and formed the basis of an application before the Court of Criminal Appeal. Although the connection between the above observation and a direction to convict is somewhat far-fetched yet the fact that it formed the subject-matter of a substantive application and the public criticism in its connection indicate in no uncertain manner that even observations of the kind should be avoided as being inconsistent with that scrupulous fairness which is invariably observed by English Judges in all criminal trials.

A BILL HAS BEEN READ FOR THE SECOND TIME in the House of Lords for the extension of the County Court jurisdiction. This bill confers jurisdiction on the County Courts in England, with some reservations, to entertain actions in which the claim is unlimited in amount. In this respect the County Courts, which are usually presided over by judges of great ability, will exercise jurisdiction somewhat similar to that exercised by subordinate Judges in this country. But this jurisdiction will be subject to the reservation that when the amount is beyond the present jurisdiction of the County Courts the suit may be transferred to the High Court at the instance of the Defendant. This extended jurisdiction of the County Courts may ultimately greatly modify the antiquated and cumbrous English circuit system. The decentralisation of the machinery for the administration of both civil and criminal justice has existed in India for a long time. What is only needed to make the system work satisfactorily is the adoption of means for securing increased efficiency in the judges presiding over our District Courts.

THE DECISION IN THE LETTERS PATENT APPEAL, *Madhu Mala v. Alfazuddi*, reported at p. 962 of the current volume, seems to be in conflict with the decision of their Lordships, Sharfuddin and Cox, JJ., in the case of *Uday Chandra Kasi v. Nripendra Naryan Bhup* reported at p. 411. In

this latter case a tenure held at a fixed rent had been existing for a period of more than 100 years before 1884. In 1884, it was split up into two tenancies without any variation of the rate of rent, the only change that occurred was that the entire rent of the tenure was apportioned between the two divisions with the consent of the landlords. Their Lordships held that this was sufficient to put an end to the old tenancy and to bring into existence two new tenancies from the year 1884 and that the presumption under sec. 50, cl. (2) of the Bengal Tenancy Act did not arise in the case.

IN THE CASE OF *Madhu Mala v. Alfazuddi* THEIR Lordships Jenkins, C. J., and Mookerjee, J., held that where a holding was created before the passing of the Bengal Tenancy Act with a stipulation that the interest which the tenant would be liable to pay on arrears of rent would be at the rate of 75 per cent., the fact that after the passing of the Bengal Tenancy Act the original tenants with the consent of the landlord sub-divided the holding into two parts with proportionate rents for each part, one of which they continued to hold while the other they relinquished in favour of a third person and this arrangement was recognised by the landlords, was not sufficient to put an end to the original holding and bring into existence new tenancies after the passing of the Bengal Tenancy Act. In the judgment which was delivered by Jenkins, C. J., his Lordship observes: "Though there has been a distribution or apportionment of the rent, this was not destructive of the original obligation nor did it bring into operation the provisions of sec. 67 of the Bengal Tenancy Act."

THE QUESTION SEEMS TO US TO BE ONE OF INTENTION OF THE PARTIES, *viz.*, whether the parties by the subsequent arrangement intended to put an end to their original rights and liabilities and to bring into existence new rights and obligations in lieu of the old ones. In the case of *Madhu Mala v. Alfazuddi* what was decided was that the mere fact that there was apportionment of rent and sub-division of the tenancy which was recognized by the landlord, was not sufficient to prove that new tenancies were created in place of the old tenancy. In the case decided by their Lordships Sharfuddin and Cox, JJ., the facts fell far short of proving any intention on the part of the parties to put an end to their old tenancy and create in its place new tenancies. The decision of their Lordships would therefore seem to run counter to the principle of the decision in *Madhu Mala v. Alfazuddi*. It appears that the decision of Sharfuddin and Cox, JJ., was not cited before their Lordships Jenkins, C. J., and Mookerjee, J., and consequently it was not judiciously considered in the Letters Patent appeal above referred to.

## CRIMINAL CASES OF 1908.

(Continued from p. cclxvi.)

### III.—EVIDENCE ACT.

CONFESSIONS.—[*Voluntariness*.] A confession does not become entirely irrelevant because there is added to it a statement improperly induced by threat or promise. To make it irrelevant it must be shown that the confession itself was improperly induced. (*Emperor v. Narayan*, 32 Bom. 111). [*Discovery*.] Under secs. 27 and 30, a confession made by one accused can be considered against another when it is the immediate cause of the discovery of some fact relevant as against such other accused (*Sankappa v. Emperor*, 31 Mad. 127). [*Admissibility against co-accused*.] When the accused has pleaded guilty and the Court prepared to convict on that plea, it is improper to postpone the conviction in order to use the provisions of sec. 30 (*Emperor v. Kheoraj*, 30 All. 540). The subject is fully dealt with in the Author's Work on *Confessions*.

DEPOSITIONS.—A deposition is admissible under sec. 80 if taken in accord with sec. 360, Cr. P. C.; if not so taken it is inadmissible, and secondary evidence cannot be given under sec. 91 (*Mohendra v. Emperor*, 12 C. W. N. 845, 847; *Kamalchinathan v. Emperor*, 28 Mad. 308). See also 23 W. R. Cr. 28; 13 Cal. 121; and cf. 11 C. W. N. 470.

ACCOMPLICE.—[*Involuntary bribers*.] The evidence of a person compelled to pay a bribe has much greater probative force than that of an ordinary accomplice (*D. L. R. v. Upendra*, 12 C. W. N. 140, following *Deonandan v. Emperor*, 33 Cal. 649; see 26 Bom. 193; 27 Mad. 271, 278, 279). A mere witness to the payment of the bribe is not an accomplice (12 C. W. N. 140, 143 *supra*). See 27 Cal. 144; 33 Cal. 649; 31 Bom. 335, 346.

### IV OTHER ACTS.

GENERAL ACTS.—[*Act XIII of 1859*.] The Act applies to masters or employers resident or carrying on business in the mofussil (*Narsingh v. Emperor*, 35 Cal. 1028). It has no force on the expiry of the contract (*Ibid*): see also 1 Weir 704, 705, 706 and 11 C. W. N. 247. An order to do the work simultaneously with one of imprisonment is illegal (*Narwaji v. Lachman*, 35 Cal. 1035; see also 4 Bom. H. C. R. 37).

[*Act V of 1861*.] The circumstances justifying an order under sec. 17 are the apprehension of a disturbance of the peace and the inability of the existing police force to cope with it. Where these circumstances are absent, a prosecution under sec. 19 for refusal to act as a special constable will be set aside (*Radhakanta v. Emperor*, 12 C. W. N. 727; *Nanda v. Emperor*, 35 Cal. 454 and *Gopinath v. Emperor*, 10 C. W. N. 82). The appointment of persons concerned in a land dispute

\* Law of Confessions, pp. 80, 83.

likely to lead to a breach of the peace is illegal (*Nanda v. Emperor*, 35 Cal. 454).

[III of 1867]. Warrants issued under the Act are governed by the general provisions of the Code as to warrants, and the officer to whom they are issued may endorse them to another officer to whom they could be legally issued in the first instance (*Emperor v. Kashinath*, 30 All. 60).

[XI of 1878]. Sec. 25 is mandatory and a condition precedent to a search (*Clarke v. Brajendra*, 36 Cal. 433). Mere temporary possession of a gun by a man who has snatched it up in order to fire at a mad dog is not contemplated by sec. 14 (*Prabhat v. Emperor*, 35 Cal. 219), but the personal use of the gun by a servant without a license is an offence (*Madhu v. Emperor*, 12 C. W. N. cxlviii), though not his merely carrying it (20 Cal. 444; 3 C. W. N. 394; 22 All. 118).

[III of 1877]. The presentation of an appeal out of time does not empower the Registrar to hold an inquiry as to the execution of a deed denied by the accused and a prosecution under sec. 82 is not advisable under the circumstances (*Sakanbari v. Adaitya*, 12 C. W. N. 47).

[XVIII of 1879]. A pleader has a right to refuse a brief, and is not bound to give his reasons therefor. He need not, if called upon to show cause under secs. 13 and 14, wait for the result of the proceeding in the lower Court, but may move the High Court at once to set it aside (*In re Nabin*, 35 Cal. 317). His license cannot be refused on a mere suspicion of complicity in an anonymous petition containing serious allegations against the Magistrate (*Re Babu Nirahjan*, 12 C. W. N. 919). Sec. 36 is of a final nature, and its terms must be strictly complied with (*Re Prasanna*, 12 C. W. N. 843n). An order thereunder can only be made on evidence taken before the persons mentioned in the section (*Re Chandi*, 12 C. W. N. 842).

[XXI of 1883]. The master is liable for an offence under the Act by his servant done in the course of his employment and for the master's benefit, and the latter's personal knowledge of, or consent to, the act is not necessary. An engine driver on board is an "artizan" within sec. 107 (*Emperor v. Haji*, 32 Bom. 10).

[XV of 1903]. The Chief Presidency Magistrate has no jurisdiction under the Act to release an accused on bail to appear before the Political Resident in a Native State in the absence of an endorsement on the warrant authorizing him to admit to bail (*Rajkumar v. Emperor*, 12 C. W. N. 602).

LOCAL ACTS.—[Bengal Council]. A licensee selling an excisable article at a different place from that specified in his license is guilty under sec. 59 and not secs. 53, 61 of Act VII of 1878 (B. C.). A servant who delivers *ganja* to a purchaser on the order of his master who sells it and receives the price is not liable under secs. 53 and 61 (*Goshla v. Emperor*, 12 C. W. N. 461). A boat cannot be

confiscated unless the owner is in some way implicated in an offence under the Act (*Golep v. Emperor*, 12 C. W. N. 139). Sec. 76 of Act II of 1882 (B. C.) prohibits not only the construction of a new *bund* but the addition to an old one (*Dwayka v. Emperor*, 12 C. W. N. 344). A standard plan prepared on the report of the medical officer and an engineer who is not a permanent servant of the Municipality is not bad. Powers of the General Committee under secs. 406 or 409 of Act III of 1899 (B. C.) discussed (*Atarmani v. Corporation*, 12 C. N. W. 1116). Sec. 408 ceases to operate after huts have been removed from the land (*Abinash v. Corporation*, 12 C. W. N. 72). Notice under sec. 383 is not necessary for an order under sec. 449 (*Susarmoyee v. Corporation*, 12 C. W. N. 271).

[Madras Council]. A license is not required under sec. 169 of Act IV of 1884 (Mad.) when a verandah or other covering is erected within the limits of adjacent property (*Narasimma v. Municipal Council*, 31 Mad. 181).

[N. W. P. Acts]. A head Constable is an excise officer within sec. 57 of Act XII of 1896 (*Emperor v. Lachmi*, 30 All. 377; see also *Queen-Empress v. Makunda*, 20 All. 70). Definition of a "street" under sec. 3 (4) of Act I of 1900 (*Municipal Board v. Dakhn*, 30 All. 70).

E. H. MONNIER.

(Concluded).

## Notes of Cases.

### ENGLISH LAW COURTS.

COURT OF APPEAL.—*Hillyer v. The Governors of St. Bartholomew's Hospital*. Before the MASTER OF THE ROLLS, LORDS JUSTICES FARWELL and KENNEDY. 23rd July 1909.

*The consulting surgeon and medical staff of a public hospital if servants of the governors of the hospital—Liability for the negligence of the staff—Duty of the Governors—Use of due care and skill in selecting medical staff.*

This was the Plaintiff's appeal. The Plaintiff entered the hospital for being medically examined gratuitously under an anæsthetic by the consulting surgeon attached to the hospital. He alleged that by the negligence of the hospital staff his hands were injured during the operation. The Defendants denied the alleged negligence and pleaded that their only duty was to select a competent staff in which they had not failed.

The Court dismissed the appeal. In the course of his judgment the Master of the Rolls observed as follows:—

It is now settled that a public body is liable for the negligence of its servants in the same way as private individuals would be liable under similar circumstances, notwithstanding that it is acting in the performance of public duties like a local board

of health, or of eleemosynary and charitable functions like a public hospital. The extent to which their property can be made liable to execution is another question, and does not arise here. The first question then is: Were any of the persons present at the examination servants of the Defendants? It is in my opinion impossible to contend that Mr. Lockwood, the surgeon, or the acting assistant-surgeon, or the acting house surgeon, or the administrator of anæsthetics, or any of them, were servants in the proper sense of the word; they are all professional men employed by the Defendants to exercise their profession to the best of their abilities according to their own discretion; but in exercising it they are in no way under the orders or bound to obey the directions of the Defendants. The true relations of the parties is, in my opinion, well stated by the Chief Justice in *Glavin v. Rhode Island Hospital* (reported in 34 American Reports, pp. 675, 679), where the Chief Justice said:—"Here the physicians or surgeons are selected by the corporation or the trustees. But does it follow from this that they are the servants of the corporation? We think not. If A out of charity employs a physician to attend B, his sick neighbour, the physician does not become A's servant, and A, if he has been duly careful in selecting him, will not be answerable to B for his mal-practice. The reason is that A does not undertake to treat B through the agency of the physician, but only to procure for B the services of the physician. The relation of master and servant is not established between A and the physician. And so there is no such relation between the corporation and the physicians and surgeons who give their services at the hospital. It is true the corporation has power to dismiss them, but it has this power not because they are its servants but because of its control of the hospital where their services are rendered. They would not recognize the right of the corporation, while retaining them, to direct them in their treatment of patients." The only duty undertaken by the Defendants is to use due care and skill in selecting their medical staff, a duty similar to that undertaken by trustees to their *cestui que trust* (a duty arising *ex contractu*—see *Adamsen* in 8 Chancery Division at page 819)—namely, to bring such skill and care to bear on the affairs of their *cestui que trust* as the reasonable man of business brings to his own. It is not suggested that there is any negligent performance of this duty; indeed so far as Mr. Lockwood is concerned, the Plaintiff went to St. Bartholomew's in order to be under his charge, and to be examined by him. This is in accordance with Mr. Justice Walton's decision in *Evans v. Liverpool Corporation* (1906, 1 K. B. 160), with which I entirely agree.

Mr. J. B. Mathews for the Appellant.

Mr. McCall, K. C. and Mr. N. Craig, K. C. and Mr. H. Marks for the Respondents.  
B. D. *Appeal dismissed with costs.*

COURT OF APPEAL.—*Wing v. London General Omnibus Coy., Ltd.* Before LORDS JUSTICES VAUGHAN WILLIAMS, FLETCHER MOULTON AND BUCKLEY. 17th July 1909.

*Accident resulting from the skidding off of a motor-car on slippery roads is not evidence of negligence or nuisance.*

This was an appeal by the Defendants from the judgment of the Divisional Court. The Plaintiff claimed damages for personal injuries caused to her by reason of the negligence of the Defendants in placing upon the high way a dangerous machine which was liable to become uncontrollable in certain slippery or other conditions of the roadway (which conditions existed at the time the injuries were sustained). The jury found that the Defendants were guilty of negligence as alleged; but the County Court Judge subsequently came to the conclusion that there was no evidence of negligence to be left to the jury and therefore entered judgment for the Defendants. On appeal the King's Bench Division reversed that judgment and decreed the Plaintiff's claim for the sum assessed by the Jury.

The Majority of the Court (LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE FLETCHER MOULTON) allowed the appeal. LORD JUSTICE BUCKLEY delivered a dissenting judgment.

In the course of his judgment LORD JUSTICE VAUGHAN WILLIAMS observed as follows:—

"No doubt the mere fact of the accident may be *prima facie* evidence of negligence when the accident itself is evidence of a defect in the particular carriage, as was the case in *Cristie v. Griggs*" (2 Campbell, 79) and *Sharp v. Gray*" (9 Bing., 458); but I do not think that an accident resulting from the tendency of motor omnibuses, however well constructed and designed, to skid is any evidence of negligence or of nuisance. So, with all deference to the Divisional Court, especially as constituted, I think this appeal must be allowed."

The dissenting judgment was in the following terms:—

"The negligence found I understand to have been this, that the Defendant Company offered to the Plaintiff for her conveyance a vehicle which was safe in certain conditions of the road, but became dangerous in other conditions of the road, and that they continued to run it after the latter conditions had arisen. In *Hyman v. Nye*, (6 Q. B. D., 685), Mr. Justice Lindley, as he then was, was discussing I agree, negligence by the employment of a vehicle defective in construction, but I think his language is in point of law equally applicable to negligence in user under circumstances when user has become

dangerous. A person who lets out carriages, he says, 'is an insurer against all defects which care and skill can guard against.' See also *Cristie v. Griggs*. This is true, I think, of defective or improper user which care and skill can guard against. His duty is, I think, to use the carriage in such proper manner and under such proper circumstances as care and skill can ensure, and if he can prove that the accident was not preventable by any care or skill in user he is not liable; but no proof, says MR. JUSTICE LINDLEY, "short of this will exonerate him." It was, in my opinion, for the jury here to say whether this vehicle, being one which in certain conditions of the road would skid and become dangerous, ought to have been used after the road had got into that condition. They have found that it ought not, and for the negligence, in my opinion, the Defendants are liable."

*Messrs. Simon, K. C., and Charles for the Defendants.*

*Messrs. Moyses and Dunbar for the Plaintiff.*  
Appeal allowed.

COURT OF APPEAL.—*Gane v. Norton Hill Colliery Coy.* Before the MASTER OF THE ROLLS, LORDS JUSTICES FARWELL and KENNEDY. 10th June 1909.

*Accident to workman while leaving by the accustomed route is accident in the course of the employment.*

This was an appeal from the award of a County Court Judge. The workman Plaintiff sued for compensation. After finishing his work at the colliery he used to leave it by the shortest way across the line to his lodgings. The County Court Judge found that that was the workman's usual way home and that it was so used with the knowledge of his employers. On the day of the accident he got under some trucks which were on the line to cross the line and while so doing the trucks were moved and his legs were crushed. The County Court Judge held that the accident did not happen in the course of the employment. The MASTER OF THE ROLLS in the course of his judgment allowing the appeal observed:—

"The terms of the workman's employment really were that, when his day's work was over, he should with all reasonable speed leave the colliery premises by the accustomed route. That was what he did, and it was in the course of his doing that that the accident happened. His Lordship felt bound to say that this accident, which happened in the immediate neighbourhood of the pit mouth on the colliery premises, was an accident which happened in the course of the employment. The employment was not limited to the moment when the workman got to the pit mouth or, at the other end of the day, to the moment when he came up from

the pit mouth. His Lordship would repeat what he had said in the case of *Cremins v. Guest, Keen and Nettlefold* (24 The Times Law Reports 189):— 'It by no means follows that every workman is entitled to the protection of the Act whenever an accident happens to him on his way from his home to his employers' place of business.' In the present case it seemed impossible to say on the admitted facts that the accident was not one which happened in the course of the employment."

The Lords Justices took the same view.

B. DUBE.

Appeal allowed.

KING'S BENCH DIVISION.—*Barkworth and another v. Gant.* Before MR. JUSTICE RIDLEY. 13th July 1909.

*Cheque fraudulently obtained, endorsed for gambling debt, endorsee paying back excess, in cheque which is cashed—Further consideration.*

This was a suit for money had and received by the Defendant to the use of the Plaintiff. One Mrs. Leslie induced the Plaintiff by a fraud to give her a cheque for £3,000. Mrs. Leslie owed £1,400 to the Defendant Gant for betting debts. Mrs. Leslie endorsed the cheque for £3,000 to the Defendant who gave a cheque for £1,600 to Mrs. Leslie and which she cashed. In giving judgment for the Defendant the learned Judge observed as follows:—

As this was not an action on a cheque or bill of exchange, but for money had and received, the question for him to consider was whether the cheque had been received by the Defendant under such conditions that it was equitable for him to retain the proceeds. He held that the cheque had not been "given" for an illegal consideration within the meaning of 9 Anne, C. 24, sec. 1; or 5 and 6 Will. IV., C. 41, sec. 1—the word applying only to the original giving of the cheque and not to its subsequent negotiation. "Somebody must suffer for this fraud, and, as there was no bad faith on the Defendant's part, the loss, as far as the £1,600 was concerned, must fall on the Plaintiff who made the fraud possible. With regard to the £1,400, it was true that the cheque was received for gambling debts, but the transaction was something more than a payment of gambling debts, owing to the giving of the counter-cheque, which in his opinion constituted a further consideration and brought the case within the decision in the case of *Goodson v. Baker* (24 The Times Law Reports, 338).

*Mr. Radcliffe, K. C. and Mr. Barkworth for the Plaintiffs.*

*Mr. Rufus Isaacs, K. C., Mr. M. Lush, K. C., and Mr. Attenborough for the Defendant.*

B. D.

Suit dismissed with costs.

**KING'S BENCH DIVISION.**—*Jones and Co. v. Coventry.* Before JUSTICES DARLING AND JELT. 20th July 1909.

*Attachment of an army officer's pension*—Sec. 141 of *The Army Act, 1881.*

This was the Defendant's appeal. The facts were these. The officer was entitled to a pension as retired pay, the pension being entirely for services already rendered. He was in the habit of allowing his bank to collect the pension and to pay it into an account into which no other payments were made. A decree-holder of the officer got a garnishee order the effect of which was that if the officer had any money of his own in the hands of a third person that money was liable to be seized under the garnishee order. He had in the said bank account the sum of £6 13s. 8d. which was money which had been received some time before as pension, but it was the balance remaining at the time when the garnishee order was served.

It was contended for the officer that the money being a pension money could not be attached whether it was in the possession of the pensioner or his agent. The garnishee order was served on January 1st, on that very date a further sum of £17 12s. 6d. became due to the officer for his pension. That sum, however, was not paid to his bankers on January 1st. The officer sent to his bankers a formal receipt for the money recoverable from the Paymaster-General. Before recovering the money the bank credited the amount to the officer's account. The money was actually paid to the bank on January 7th. The learned Judges held that the sum of £17 12s. 6d. could not be attached under sec. 141 of the Army Act, 1881; but the other sum of £6 13s. 8d. was properly attached.

MR. JUSTICE DARLING observed as follows:—

Mr. McCordie chiefly relied upon the case of "*Crowe v. Price*" (22 Q. B. D., 429), in which Lord Esher in giving judgment said:—"I adhere to the opinion expressed by this Court in *Lucas v. Harris* (18 Q. B. D., 127) that sec. 141 of the Army Act, 1881, was passed in favour of officers and soldiers on grounds of public policy, and that it must be construed so as to protect pensions granted to them for their services. The question in the present case is whether this sum of £109 has ceased to be pension, for if it has not it is money which could not be taken in equitable execution." Lord Justice Fry said: "The money remained pension, of which one may use the expression that it had not been 'reduced into possession.' It might be different if the officer had received it, and had paid it into his bankers, or had bought furniture with it. But this did not happen, the money was intercepted for a limited purpose, which came to an end while the money was still on its way to the officer, and it never lost its character of pension."

That, I think, is the test. Had the money lost its character of pension or did it still remain pension? I think that pension which has been paid to the person entitled to receive it is no longer pension, but that it loses its character as pension just as dividends which have been paid over lose their character of dividends. It becomes simply a part of his ordinary money. I think, therefore, that with regard to this money, which had been paid over to the officer and which simply for his convenience had been paid to his bankers and by them credited to him, had entirely lost its character as pension, and not being pension does not come within the terms of sec. 141 of the Act.

Mr. H. A. McCordie for the Defendant.

Mr. Moresby for the Plaintiffs.

B. D. Appeal allowed in part.

**CHANCERY DIVISION.**—*Jarvis* (on behalf of himself and other debenture-holders) *v. Islington Borough Council and Lane.* Before MR. JUSTICE WARRINGTON. 26th June 1909.

*He who comes to equity must come with clean hands.*

This was a motion by the Plaintiff for an injunction to restrain the Defendants from distraining the goods which the Plaintiff held as receiver on behalf of the debenture-holder of the North Eastern Dairy Coy., "Ltd." The Plaintiff was appointed receiver by himself and other debenture-holders on certain conditions, and was carrying on the Company's business. The Company was fined £100 for selling adulterated milk and the Defendant Lane distrained goods on the Company's premises. The Plaintiff contended that the goods did not belong to the Company, but to the Plaintiff as receiver for the debenture-holders.

The learned Judge in the course of his judgment dismissing the motion observed as follows:—

This was a motion for an injunction—an application to the Court to stop, *pendente lite*, what was alleged to be a wrong. A person who came for that relief must come with clean hands. The Plaintiff did not come with clean hands. The offence of which the company was convicted was the act of the Plaintiff himself. He knew that separated milk was being put into the churns on the morning in question for the purpose of being sold as milk. On the Plaintiff's own evidence the Court was satisfied, as the Magistrate had been satisfied, that the Plaintiff himself committed the offence. It would be intolerable if a man to whom goods were said to belong, could commit an offence under the Food and Drugs Act, and do it in the name of some one else, and then when that some one else was convicted say that the goods on which distress was issued were not the goods of the party convicted but were his own, and so could prevent the Crown from obtaining the penalty to which it



was entitled in such a case. It was quite impossible that the Plaintiff could come to a Court of Equity and get relief. The injunction must be refused. The Court would say nothing as to the debenture-holders' rights if they could go on with the action if they choose. But the Court declined to give the Plaintiff the special relief by injunction.

Messrs. Cane, K. C., and C. J. Mathew for the Plaintiff.

Messrs. Terrel, K. C., and Gatey for the Defendants.

B. D. Motion dismissed with costs.

### PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD MACNAGHTEN.	}	LALITESHWAR SINGH,
LORD DUNEDIN.		Appellant
LORD COLLINS.		v.
SIR ARTHUR WILSON.		BRABESHWAR SINGH
• 1909,		AND OTHERS, Res-
• 9 <sup>th</sup> July.		pondents.

Preliminary decree—Stay of proceeding pending appeal to Privy Council.

This was an application on behalf of the above named Appellant for stay of execution of a Decree. The facts were these:—

Maharaj Kumar Guneswar Singh died on the 20th March 1903, leaving a will by which he disposed of his property, and the Petitioner, one of his two sons, the executor of his will. The Petitioner applied for probate of the said will but the District Judge refused his application. The High Court at Calcutta reversed the order of the District Judge and granted probate. Thereupon the above-named Babu Bhabeswar Singh, son of the testator and the other Respondents appealed to His Majesty in Council against the order of the High Court. The said appeal is pending for hearing. On the 27th September 1905, the District Judge granted probate to the Petitioner. On the 9th November 1905, the said Babu Bhabeswar Singh instituted a suit against the Petitioner and others for a declaration that the said will was invalid and inoperative and for partition of the properties left by the said Guneswar Singh.

The Petitioner's defence, *inter alia*, was that the said will was good and valid, and that the disposition of his property made by the testator was binding on his heirs. The District Judge found against the Petitioner, and therefore made a preliminary decree in favour of Babu Bhabeswar Singh declaring his right to have a share in the testator's estate, and directing that the partition prayed for should be made. The Petitioner preferred an appeal to the High Court from the said decree.

Pending the hearing of this appeal, the Petitioner applied to the High Court for stay of execution of the said decree for partition. This was

granted with the result that the Petitioner was appointed Receiver during the pendency of the appeal on his furnishing the necessary security.

Subsequently the High Court dismissed the appeal with costs.

The Petitioner obtained from the High Court leave to appeal to His Majesty in Council against the said decree.

On the 4th March 1909, the Petitioner made an application to the High Court, in which he prayed for an order that further proceedings in pursuance of the said preliminary decree for partition, should be stayed pending the decision of his said appeal to His Majesty in Council.

The High Court did not dispose of the application on its merits, but after referring to Order No. 41, Rule 5, and Order No. 45 Rule 13 of the Civil Procedure Code (Act V of 1908), made an order rejecting the said application on the ground that "the Court which has power to stay proceedings under the Code, is the Court which has seisin of the appeal, namely, the Judicial Committee of the Privy Council." Hence this petition.

Mr. Ross (for the Petitioner) submitted that heavy expenses would be incurred in the carrying out of partition proceedings, and in the event of their Lordships' reversing the decree of the Court below, such expenditure would be thrown away. He cited *Vasudeva Modaliar v. Shadagopa Modaliar*, L. R. 33 I. A. 132.

Mr. DeGruyther (for the Opposite Party) contended that under the circumstances of the case the partition proceedings should not be stayed.

Their Lordships' order was delivered by

LORD MACNAGHTEN.—The proceeding in execution of the preliminary decree for partition made by the Court of the District Judge of Durbhanga be stayed until the determination of the appeal by this Board upon such terms as to security and as to expediting the preparation of the record in India and as to the appointment of a receiver or otherwise as the High Court upon an application in that behalf may think fit to impose. Costs of this petition to be costs in the appeal.

B. D. Stay of proceeding allowed.

### CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before COXE and RYVES, JJ. CRIMINAL REVISION No. 853 OF 1909. MOOL CHAND, Petitioner v. RAM NARAIN TOLLA, Opposite Party. 29th July 1909.

Cheating—Penal Code, sec. 420.

This Rule was issued upon the Chief Presidency Magistrate to show cause why the conviction and sentence of the Petitioner should not be set

aside on the grounds that the facts found did not constitute the offence of cheating. The Petitioner was a broker. The charge against him was that he received certain goods from the complainant promising to pay cash which he did not pay. In a previous transaction the Petitioner received goods on a similar promise which he had failed to perform.

Their Lordships observed :—

It appears that on account of this previous failure of the accused to carry out his promise, the complainant took a promissory note from the accused in which the accused promised to pay the amount agreed upon with interest and one of the conditions was that no payment was to be recognised unless endorsed on the back of the note. From this alone it is quite clear that there was no cheating.

*Mr. K. N. Chowdhuri* (with *Babu Mannatha Nath Mukherjee*) for the Petitioner.

*Rule made absolute.*

**CIVIL APPELLATE JURISDICTION.** Before CASPERSZ, J. APPEAL FROM APPELLATE DECREES NOS. 563 AND 586 OF 1908. *SRI NARAIN AND OTHERS*, Plaintiffs, Appellants *v.* *RAM SAHAI*, Defendant, Respondent. 12th June 1909.

*Non-occupancy raiyat—Tenancy for term—Stipulation to vacate or pay a very high rent—Ejectment—Procedure—Penalty—Bengal Tenancy Act (VIII of 1885), secs. 44, 46, 178.*

The Defendant took a lease for seven years of two plots of land from the Plaintiff stipulating to pay rent at the rate of Rs. 4 per bigha. The *kabuliyat* was dated the 1st April 1897 and the land was described therein as the *khudkast* jote of the landlord and contained the following terms. "After expiry of the term of this *kabuliyat* I and my heirs and representatives shall have no right to cultivate the said land without obtaining a fresh patta and executing a fresh *kabuliyat* and if I cultivate the same or get it so cultivated then I and my heirs and representatives shall pay rent therefor at the rate of Rs. 10 per bigha." After the expiry of the term the Plaintiff did not give the Defendant any notice under sec. 45, Bengal Tenancy Act, but long after the expiry of six months of the lease Plaintiff brought the present suit for ejectment and in the alternative for rent at the rate of Rs. 10 per bigha. The lower Courts dismissed the suit and held that the Defendant is a non-occupancy raiyat and the Plaintiff appealed. It was argued (1) the land was stated in the *kabuliyat* as *khudkast* of Plaintiff and the Defendant is estopped from denying the same and set up tenancy right. (2) Sec. 45, Bengal Tenancy Act is no bar to the present suit for ejectment. (3) That under registered contract the landlord is entitled to the rent of Rs. 10 per bigha as stipulated therein. For the Respondent it was pointed out (1) that the

admission in the *kabuliyat* that the land is *khudkast* is no evidence and not binding on Defendant. 7 C. W. N. 400, 1 C. L. J. 456, 13 C. W. N. 661. (2) Suit being based on the *kabuliyat* and the cause of action being the expiry of the lease sec. 45, Bengal Tenancy Act, applied and the provision thereof not having been complied with there could be no ejectment. The Plaintiff's remedy was to proceed under sec. 46, Bengal Tenancy Act, for a fresh *kabuliyat* failing which to eject, see also sec. 178, Bengal Tenancy Act. (3) The stipulation as to rent at Rs. 10 a bigha was in the nature of penalty, further Rs. 10 per bigha was not the rent of the holding when the tenant was admitted into occupation of the land (I. L. R. 22 Cal. 658 : I. L. R. 25 Cal. 75.)

*Held*—The admission in the *kabuliyat* that the land was *khudkast* was not binding on the tenants under sec. 178 (c), Bengal Tenancy Act, that the tenant can be ejected only according to the provision of the Act which in this case is provided in sec. 45, Bengal Tenancy Act. The proper course for the Plaintiff was to take proceeding under secs. 44 and 46, Bengal Tenancy Act and the Plaintiff cannot get a decree at the rate of Rs. 10 per bigha the stipulation being in the nature of penalty.

*Babu Hara Kumar Mitra* for the Appellants.

*Babu Khetra Mohon Sen* for the Respondent.

A. T. M. *Appeals dismissed with costs.*

**CIVIL APPELLATE JURISDICTION.** Before STEPHEN and CHATTERJEE, JJ. APPEAL FROM APPELLATE DECREE NO. 2285 OF 1907. *KAMLA, PROSAD SINGH AND OTHERS*, Appellants *v.* *JHONTI RAOT AND OTHERS*, Respondents. 30th July 1909.

*Bengal Tenancy Act (VIII of 1885), Sch. III, Art. (b)—Landlord—Lease, expiry of—Rent, suit for.*

The Plaintiffs sought to recover the arrears of rent in respect of the last kist of 1307 to the end of 1311. They were met by the answer that the case fell under Art. 2 (b) of the 3rd schedule of the Bengal Tenancy Act. The question therefore arose whether the Plaintiffs were landlords under para. (1) of that article. The lease in respect of which they sued terminated in 1311 and when the suit was brought in 1313 they were no longer landlords to the Defendants.

*Held*—That the suit was governed by Art. 2 (b) of the 3rd schedule of the Bengal Tenancy Act.

*Maharaj Bahadur Singh v. A. H. Forbes* (I. L. R. 35 Cal. 737) referred to.

*Babus Umakali Mukerji and Chandra Sekhar Banerjee* for the Appellants.

*Babu Baldeo Narain Singh* for the Respondents.

A. T. M. *Appeal allowed.*

# THE Calcutta Weekly Notes.

Vol. XLII.]

MONDAY, AUGUST 30, 1909.

[No. 42]

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### REPORTS (See Index.)

THE HIGH COURT WILL CLOSE ON THE 2ND OF September next. The Civil Courts will close on the 12th of October. Thus the business in the Civil Courts will go on for nearly six weeks after the High Court closes. Such a long interval between the commencement of the vacation of the High Court and the Civil Courts subordinate to it is bound to cause inconvenience to the appellants to the High Court. If the interval was only a fortnight, it would not much matter. A month would then be available to suitors for moving the High Court for relief against the decrees and orders of the lower Courts and in the course of a month a large number of appeals may also be disposed of. Further we have pointed out before, that of the long vacation extending over nine weeks or more hardly a month is available to the majority of the members of the legal profession connected with the High Court. The Attorneys, Solicitors and Vakils cannot realize their dues from the clients before the eve of the *Pujah* and many members of the Bar in their turn have also to await payment till then. Should the High Court close a week or a fortnight before the *Mohalla*, when the Civil Courts close, and re-open after two months, at least six weeks of the vacation would be available to the majority of the members of the legal profession. We beg to invite the attention of the Hon'ble Chief Justice and the Hon'ble Judges to this as also to our suggestions

in this respect in our issues of 24th August 1908 and 26th August 1907.

WE HEARTILY CONGRATULATE THE GOVERNMENT of Bengal on the postponement of the passing of the Police Bill *sine die*. There is no chance of any calamity overtaking this city in consequence. When the existing Acts have been found sufficient to maintain the peace of the city for the last forty-three years, we think they are entitled to a much longer lease of life. We believe that it is at the instance of His Honour the Lieutenant-Governor that the Bill has been held over. What we particularly appreciate in Sir Edward Baker is that, in spite of his strong personality, he has shown on more than one occasion during the progress of this Bill that he is prepared to show due regard to public opinion. The Reform scheme would be unmeaning if the executive heads of the Local Governments in this country do not come to regard themselves as the constitutional Presidents of the Reformed Councils when they come into existence. Sir Edward Baker has given ample proof that he will. His appeal to the members of the Civil Service to receive the changes consequent on the Reform scheme in a loyal spirit would have been meaningless platitude if he himself did not lead the way and show in practice how even the highest executive in the Province should respect public opinion.

IN THE UNITED KINGDOM PEOPLE WHO ARE FINED on conviction in a criminal case are allowed to pay the fine by instalments. This system should also be introduced in India. It is frustrating the object of fine to imprison a person if he is unable to pay it all at once. There can be no possible difficulty about realizing fine by instalments in this country. The instalments may be fixed by the Court and on the failure of any instalment he may be detained in prison till the instalment is paid or for the alternative period in lieu of fine. The people of this country have always a home and a family and they may be ordinarily enlarged on their own recognisance after fixing the instalments. In cases where a person has no fixed abode or family or has not apparently sufficient means for the payment of the instalments, he may be required to find a surety for the regular payment of the instalments. The Hon'ble the Law Member

of the Government of India may frame a short Bill for the purpose and may include it amongst the legislative programme for the next Session of the Council. On the passing of the Act, the Local Governments may give instruction to the Magistrates on the same lines as the successive Home Secretaries in England have done from time to time.

WE TAKE THE FOLLOWING QUESTION AND ANSWER in Parliament from the *Justice of the Peace* of the 7th of August last and invite special attention to it.

On the 28th ult. Mr. Watt asked the Home Secretary whether, in view of the fact that about 95,000 persons are each year imprisoned throughout the Kingdom in default of payment of the fines imposed on them, he would consider the advisability of allowing these prisoners the opportunity of paying the fines by instalments.—Mr. Gladstone: The existing law makes ample provision for allowing Defendants time to pay their fines, and to pay them by instalments. I am not sure that Courts of summary jurisdiction are always as ready as they might be to take advantage of these provisions, and I have repeatedly urged on magistrates the desirability of doing so, both in particular cases where their powers in the matter appear to have been overlooked, and by drawing attention to a circular on this subject issued by my predecessor at the Home Office to all Courts of summary jurisdiction in June 1905. The matter is one of great importance as the committal of Defendants to prison in default of the payment of fines, which if time were allowed they might have paid, may involve great hardship on the persons so committed, and (if they are first offenders) may seriously detract from the deterrent effect which imprisonment ought to have.

THE ATTEMPT OF THE PRESENT LIBERAL LORD Chancellor to extend the County Court Jurisdiction on the lines of the District Civil Courts in India and the Sheriff's Court in Scotland has, it seems, been frustrated by his Conservative predecessor Lord Halsbury. Since the second reading of the Lord Chancellor's Bill, it would seem that the House was divided by the Ex-Chancellor and while thirty-two declared in its favour, thirty-seven were opposed to it. Amongst the supporters of the Bill were Lord Gorrell, Lord James, Lord Courtney and Lord Welby, and the Archbishop of Canterbury; amongst the opponents were Lords Alverstone, Ashbourne, Macnaghten and Collins.

THE DOCTRINE OF MALICE IN LAW IN CASES OF defamation seems to have been pushed too far in the recent case of *Jones v. E. Hulton & Co.* (2 K. B., p. 444, 1909). The facts of the case are that a certain newspaper published an article which contained certain defamatory statements concerning a named person, believed by the writer of the article and the proprietors, publishers and printers (who were the Defendants) to be a fictitious personage. The name they believed to be an unusual one not likely to be that of an existing individual. The material portion of the article on which an action for defamation was brought

by the Plaintiff was this:—"Whist? there is Artemus Jones with a woman who is not his wife . . . who would suppose, by his goings on, that he was a churchwarden at Peckham."..... The Plaintiff who was a Barrister and bore the name of Artemus Jones, but who did not live at Peckham, nor was a churchwarden, brought a suit against the proprietors, publishers and printers of the newspaper, on the allegation that a number of persons reading the article thought that it referred to him and that in consequence he had suffered in reputation and in his professional income. The Defendants averred that they did not know that the article referred to the Plaintiff and it was proved in the case without any dispute that the Defendants had not any intention to defame the Plaintiff and that the name used in the article was a fictitious name.

TWO OF THE LEARNED JUDGES OF THE COURT OF Appeal (Lord Alverstone, C. J. and Farwell, L. J.) held that the Defendants were liable to pay damages to the Plaintiff, while Fletcher Moulton, L. J., held that the Plaintiff could not succeed on the facts of the case. The important question discussed was whether the fact that the Plaintiff suffered damages in consequence of the publication of the article was sufficient to make the Defendants liable even though they had no intention to defame the Plaintiff specially as they did not know that the article could in any way refer to the Plaintiff. It was proved in the case that many persons who knew the Plaintiff by name thought that the article referred to him but it was also proved that those who knew him intimately did not think that the article referred to him. But still it was held by the majority that because the statement published was untrue and defamatory, and reasonable people who knew the Plaintiff understood it to refer to the Plaintiff, the Defendants were liable to pay damages to the Plaintiff to compensate him for the loss he suffered on account of the publication. In this case the article was written in such a vein as to lead its readers to believe that it referred to a real event and a real person, so people might think that it referred to the Plaintiff from the fact that he bore that name although other descriptions did not agree with him. The guiding principle of the decision of the majority seems to be that the Plaintiff had suffered a loss in consequence of a publication for which the Defendants were responsible and the Defendants must compensate the Plaintiff for the loss. But much could be urged in favour of the Defendants and the arguments in their favour were stated in forcible and clear language by the dissentient Judge. If in a case like this the Defendant is liable, then a Defendant will be liable at the suit of all persons who will be able to prove that their neighbours thought that the article referred to them.

## CURRENT INDIAN CASES.

LACHMAN v. NABI BAKSH, I. L. R. 31 All. 109. *Agra Tenancy Act, sec. 31.*

In a suit for ejectment of an occupancy raiyat the latter's sublessee falls under sec. 31 of the Agra Tenancy Act, and an appeal in such a case does not lie to the District Judge.

BEHARY v. BHAGWAN, I. L. R. 31 All. 114. *Sale—Mortgage-decree—Money-decree.*

A person obtaining a money-decree as well as a mortgage-decree may bring to sale the mortgaged property in pursuance of an application that it may be sold for the realisation of the amounts of both the decrees.

BIBA JAN v. KALB HUSAIN, I. L. R. 31 All. 136. *Wakf.*

A wakf created mainly for pious and charitable purposes was declared to be valid although there was a direction for payment of expenses at the anniversaries of the deaths of members of the Waquif's family.

EMPEROR v. GUTALI, I. L. R. 31 All. 148. *J. P. C., sec. 302.*

An accused was convicted under sec. 302, I. P. C., when for facilitating robbery he had administered Dhatura in such quantity as caused the death of the person to whom it was administered.

JHAGAI v. RAM PARTAP, I. L. R. 31 All. 150. *Cr. P. C., Chap. XII—Revision.*

The High Court cannot send for records of cases decided under Chap. XII of the Cr. P. C., either under the Code or sec. 15 of the Indian High Courts Act, 1869.

GANGADAYAL v. MONIRAM, 31 All. 156. *Minor—Sale—Suit—Limitation.*

A suit within 3 years of a person coming of age to set aside a sale made by his guardian during his minority is not barred by limitation although another brother of the minor whose property had been sold during his minority by the same guardian had not brought a suit to set aside the sale and although the period for bringing such a suit had been over.

GAJADHAR v. KAUNSILLA, I. L. R. 31 All. 161. *Maintenance—Hindu widow—Remarriage.*

A Hindu widow who remarried according to the rule of her caste is not desentitled to claim maintenance when she had during the life-time of her

husband obtained a decree against him for maintenance and the maintenance had been made a charge upon a property.

HAR PRASAD v. RAGHU NANDAN, I. L. R. 31 All. 166. *Mortgage—Payment of mortgage debt—Co-mortgagor.*

A mortgagor obtains a charge on his co-mortgagor's share by payment of the mortgage debt and such charge takes priority over a subsequent mortgage.

HAMID-UN-NISSA v. NAZIR-UN-NISSA, I. L. R. 31 All. 170. *Transfer of Property Act, sec. 53.*

A transfer of property by a Mahomedan to one of his wives in satisfaction of her claim for dower is not necessarily unimpeachable, when another wife had already brought a suit for recovery of her dower; it has to be found as to whether the transfer was real or merely colorable.

RAM KUMAR v. ALI HUSAIN, I. L. R. 31 All. 173. *Compromise with one of the Defendants, effect of.*

In a suit for damages for an assault the compromise by the Plaintiff with one of several Defendants does not debar him from claiming damages against the others.

CHANDRABO v. MATA PRASAD, I. L. R. 31 All. 176. *Mitakshara law—Alienation.*

A Mitakshara father cannot bind his sons by creating a mortgage of joint family property unless the loan is one for family necessity or for an antecedent debt.

## Reviews.

THE BENGAL TENANCY ACT. Second edition. By Surendra Chandra Sen, B. L., Vakil, High Court, Calcutta. Weekly Notes Office, 3 Hastings Street. 1909.

A new edition of this work has been overdue for some time. The first edition appeared in 1904, and its merits soon secured for it popularity amongst legal practitioners. But since the appearance of the first edition more than five years have elapsed and during this period there has accumulated an amount of caselaw, which in quantity as well as importance will bear comparison with the output of any previous 5 years, and what is of no less importance the two Legislatures of Bengal and Eastern Bengal have passed amendments of the Act of a more or less far-reaching character. It is superfluous to say that all these new matters have been incorporated in the present edition. The differences in the provisions of the

Act as applying to the two provinces are very well brought out by printing them in parallel columns. The consequent increase in the size of the book is very noticeable. The caselaw has been handled by the author with characteristic insight, and the facilities provided for ready reference by means of sub-headings and marginal notes enhance the value of the notes. A more detailed notice of the book is hardly needed. We may mention however that in the appendix, besides the rules framed by the Bengal Government and the High Court, and Notifications (including those extending the operation of the Act to Non-Regulation districts of Bengal and East Bengal), rules of the Registration Department, and notes on points of law not arising directly out of the provisions of the Act but bearing closely on the law of Landlords and Tenant of the Provinces, there appears a collection of price-lists of staple food-crops prepared by the Local Governments under sec. 39 of the Act commencing from 1887 downwards. These lists must prove of great value in all operations relating to the settlement of rent. The only defects noticeable in the present edition consist of some clerical errors in the notes which though they may appear to be of a trifling character might still have been easily avoided. We have no doubt however that in its present improved form the book will win for itself even greater popularity amongst legal practitioners in these Provinces than its predecessor.

**THE LAWS OF ENGLAND.** Being a complete statement of the whole Law of England. *By the Right Honourable the Earl of Halsbury, Lord High Chancellor of Great Britain 1885-86, 1886-92 and 1895-1905 and other lawyers.* Vol. VIII. London. Butterworth & Co., 11 and 12 Bell Yard Temple Bar. Law Publishers. 1909.

The preparation of this great work is, we are glad to note, progressing rapidly. The present volume deals with the following titles: 1. Copy-holds. 2. Copy-right and literary property. 3. Coroners. 4. Corporation. 5. County Courts. Of these the first and the last titles are of local interest, and the provisions of the English law relating to coroners have not much in common with the similar provisions prevailing in the Presidency Towns in India. We need only note in passing the complexity of the English law relating to coroners. But the two remaining titles are of great importance to lawyers, literary men and public bodies in this country. The subject "Copy-right and literary property" is dealt with under the following main headings: I. Literary copy-right. II. Performing right in dramatic pieces and musical compositions. III. Artistic copy-right, under which heading are embraced Paintings, Drawings, Photographs; Prints, Engravings, Lithographs; and Sculpture, Models, and Casts. In

dealing with these topics, the law as to Foreign and Colonial copy-right is noticed along with the law as to English copy-right. We need not enlarge upon the advantage of having an exhaustive and up-to-date account (the law is stated as at June 2nd, 1909) of the law dealing with this very important subject. The other title of importance to us, *viz.*, "Corporations," deals with the general principles of law applicable to all corporations, the law applicable to particular classes of corporations being reserved for separate treatment under different special titles. Though different writers have been responsible for the different subjects dealt with in this work, they all show a high level of excellence both in quality and in method which leave little to be desired.

**THE INDIAN PENAL CODE** and other laws relating to the Criminal Courts of India, with notes and appendix. *By J. O'Kinealy, late of the Indian Civil Service and Judge, High Court, Bengal, and C. P. Caspersz, I. C. S., of the Inner Temple, Barrister-at-Law, and Judge, High Court, Bengal. Thoroughly revised, enlarged and brought up-to-date. Fourth edition. Calcutta. S. K. Lahiri & Co., 54 College Street. 1909.*

Commentaries on Codes certainly do not lose, if they do not gain, by being brief and concise. The busy practitioner always takes kindly to commentaries which add to their other merits that of brevity. Mr. Justice O'Kinealy's commentaries were invariably marked by that quality of brevity which has been classically styled as the essence of wisdom. We are glad to observe that the present editor has been able to preserve in his revised notes this very commendable quality. He has also done another and no small service to the profession by collecting in the appendix the following Acts: The Cattle Trespass Act, the Criminal Tribes Act, the Prevention of Cruelty to Animals Act, the Extradition Act, the Merchandise Marks Act, the Metal Tokens Act, the Workman's Breach of Contract Act, the Oaths Act, the Whipping Act of 1909, the tale being rounded off with those other Acts which in the preface are compendiously referred to as Acts relating to the Unrest, *viz.*, the Reg. No. III of 1818 and subsequent amendments thereof, the Newspapers (Incitement to offences) Act, the Prevention of Seditious Meetings Act and lastly the Criminal Law Amendment Act. We would add that we have tested the case-notes and have found them accurate and up-to-date. We have no doubt that the book will prove useful for ready reference to legal practitioners and Magistrates alike.

**THE INDIAN PENAL CODE.** (Act XLV of 1860 as amended) with all the Indian cases collected

under each section and with cross-references when reported under more than one section. *By the late Charlton Swinhoe. Second Edition. Revised and brought up to June 1909. Calcutta, Thacker Spink & Co. 1909. Price Rs. 7.*

The title fairly indicates the character of the work. It is what is called a "case-noted" edition of the Penal Code. Experience has shown that besides commentaries, legal practitioners require "case-noted editions" of the Codes and their value depends on the arrangement of the case-notes. The case-notes in this book are arranged in the order of their dates. The references to the report are given first and they are followed up by the notes. Names are omitted and in consequence also the usual list of cases. A good index furnishes facilities for reference which is naturally lacking in what must be a more or less mechanical arrangement of the notes according to dates. The book will prove handy for purposes of ready reference.

### Notes of Cases.

#### ENGLISH LAW COURTS

##### PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD MACNAGHTEN.	} NAWAB FIAZ ALI KHAN, Appellant, v. KALLU SINGH and others, Respondents.
LORD COLLINS.	
SIR ANDREW SCOTLE.	
SIR ARTHUR WILSON.	
1909, 30, July.	

#### Special leave, application for.

This was an application for special leave to appeal to His Majesty in Council against the judgment of the High Court (reported in I. L. R. 30 All. 394). The facts stated in the petition were these: On the 9th May 1905, Kallu Singh and Pirthi Singh, the Plaintiffs, filed a plaint in the Court of the Munsif of Khurja against the Petitioner, Nawab Fiaz Ali Khan, and Mussamat Ganga whereby they claimed to redeem the half share in a mortgage made (as alleged by them) in 1850 by Sher Singh and Khawan Singh (brothers) of 76 bighas and 5 biswas of land situate in Mouzah Bahel in the Bulandshahr District to Gulzari and Kundan Lal for Rs. 495. The plaint further alleged that the heirs of Gulzari and Kundan Lal had sold their rights as mortgagees on the 22nd December 1861 to the ancestors of the 1st party Defendant (i.e., Petitioner), that Sher Singh and Khawan Singh had lived separate and after Sher Singh's death his half share had been sold by auction, that Gaura Kunwar, widow of Khawan Singh, had (as they alleged) taken a life interest in his share, that one Deo Kishen had sued Gaura Kunwar on a bond, that the equity of redemption had been purchased by Ram Chandar, ancestor of the 2nd party Defendant, that

(as they contended) all that could be sold at auction was Mussamat Gaura's life-interest, and that the Plaintiffs were her heirs and that the Petitioner had unlawfully obtained from the 2nd party Defendant a deed of relinquishment. The Plaintiffs further contended that the mortgage debt had been satisfied by the usufruct and that a large surplus was due to the Plaintiffs as mesne profits for which a separate suit would be brought.

By his written statement, dated the 14th June 1905, the Petitioner pleaded that the suit was barred by limitation, that no mortgage had been made in 1850, that he had been in adverse possession for 12 years, that 48 bighas and 15 biswas of land had been mortgaged by the Plaintiff's ancestor for Rs. 995 but that the mortgage had long since become unenforceable, that Sher Singh and Khawan Singh were own brothers and lived jointly, that Mussamat Gaura had become the absolute owner of her husband's property after 12 years, that she had sold for necessity, that the income of the property was not sufficient to cover the interest, that the settlement arrived at with Mussamat Ganga Kuar was perfectly valid and that the Plaintiffs had been parties to Deo Kishen's suit and were bound by it and that in any case the Defendant was entitled to be repaid what he had paid for Khawan Singh's share, viz., Rs. 2,500.

The Munsif found that the share of Kunwar Singh was separate from that of Sher Singh, that the Plaintiffs had inherited Sher Singh's property, that Mussamat Gaura as widow of Khawan Singh inherited his property on his death and that the property had been sold in enforcement of a legal debt contracted for a legal necessity and he therefore dismissed the Plaintiffs' claim.

The Plaintiffs having appealed to the Additional District Judge of Aligarh the Judge on the 2nd of August 1906, and in accordance with objections raised by the Petitioner under sec. 561 of the Civil Procedure Code, dismissed the Plaintiffs' appeal on the ground that the Plaintiffs' action was barred by sec. 13 of the Civil Procedure Code, the Plaintiffs having been parties to a suit brought by Deo Kishen, against the Petitioner and themselves and which had been decided by the Subordinate Judge of Aligarh on the 13th September 1898.

The Plaintiffs appealed against this decision to the High Court at Allahabad and on the 2nd July 1907, one Judge of the Court remanded the case to the Court of the Additional Judge under sec. 566 of the Code of Civil Procedure for finding upon the issues of the questions of fact found against the Plaintiffs by the Court of first instance and the Court directed that no further evidence should be taken.

The finding of the Court on remand was that Mussamat Gaura had incurred the debt for legal necessity but after an inspection of the *wasit-un*



are (record-of-rights) the Court found that the consideration for the mortgage was not Rs. 1,000 as held by the Munsif but Rs. 495. The Court also found that the receipts from the property were more than sufficient to defray the interest and that the usufruct had been sufficient to satisfy the mortgage debt long previously.

On the hearing by the High Court after the remand that Court held that the Plaintiffs' suit was not barred by sec. 13 of the Civil Procedure Code, that Mussamat Gaura had only a life-interest in the property and that only this life-interest passed to the auction purchaser. The High Court therefore reversed the decisions of both the lower Courts and decreed the Plaintiffs' claim.

The Petitioner thereupon applied to the High Court under sec. 596 of the Code for a certificate under sec. 600 of the Code that the case was a fit one for appeal to His Majesty in Council but the High Court refused to grant the certificate on the ground that the subject-matter in dispute was of the value of less than Rs. 10,000. Hence this Petition.

*Mr. Raikes* for the Petitioner.—It is admitted that Mussamat Gaura sold the property for maintenance of the family and agricultural requirements. The Munsif found that the sale was for legal necessity under the Hindu law. The High Court ought not to have decreed the suit without coming to any decision on the question of legal necessity. Further, the decision in *Deo Kishen's* suit to which the Plaintiff was a party was *res judicata* to the present suit. It was submitted that although the subject-matter of the appeal was of the value of less than Rs. 10,000 substantial questions of law were involved in the appeal. *Ram Kumar v. Ichamoyee Dasi*, I. L. R. 6 Cal. 36, was referred to.

Their Lordships' order was delivered by LORD MACNAGHTEN. "Their Lordships are unable to advise His Majesty to grant special leave to appeal."

B. D.

*Petition rejected.*

## CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before JENKINS, C. J., and CASPERZ, J. CRIMINAL REVISION No. 645 OF 1909. GOVINDA CHANDRA DATTA, Petitioner *v.* THE KING-EMPEROR, Opposite Party. 21st July 1909.

*Charge—Alteration—How far allowable—Evidence, when High Court will consider, in revision.*

The Petitioner was charged with having committed offences under secs. 147, 342, 379, &c., I. P. C., on the 3rd of January 1909. The Petitioner adduced evidence to prove that he was not at the scene of occurrence on that day and that evidence was apparently regarded by the trying Magistrate to be satisfactory. But the Magistrate instead of finding that the Petitioner could not have committed the offence on the 3rd January, altered the date in the charge from the 3rd January 1909, to the 27th December 1908, because on his perusal of certain documents he came to notice one which led him to infer that the occurrence had taken place on the 27th December 1908. Before this alteration of the date in the charge the prosecution witnesses had said that the occurrence had taken place on the 3rd January, but after the alteration, when these very witnesses were examined again they said that the occurrence had taken place on the 27th December 1908. The Petitioner was convicted and sentenced to one month's imprisonment and to pay a fine of Rs. 150.—On appeal the conviction and sentence were upheld.

This rule was issued for setting aside the conviction and sentence. Their Lordships observed:—

"Though we are dealing with this case in revision, and are therefore loath to interfere with findings of fact, still we feel that the circumstances of this case are so special that we shall not be disregarding any general rule or principle in determining that it would be obviously unsafe to uphold this conviction based as it is on such accommodating evidence. It is not as though there had been a mistake of date due to a clerical error or a mistake of date disclosed by evidence in the course of the hearing; it is an alteration of date made to support a new theory, and this new theory is established by the evidence of witnesses who had been equally ready to establish the commission of the offence on a different date. In the circumstances we feel that the risk of upholding the conviction would be too great."

*Mr. Nurudeen Ahmed* for the Petitioner.

*Rule made absolute.*

**CRIMINAL REVISIONAL JURISDICTION.** Before COXE and RYVES, JJ. CRIMINAL REVISION NO. 122 OF 1909. PARESH NATH BISWAS, Petitioner, v. THE EMPEROR. 10th August 1909.

*Code of Criminal Procedure, secs. 133, 137—Arbitration by Magistrate—Evidence—Jurisdiction.*

On the 12th February 1909, one Behari Lal Karmokar filed a petition of complaint before the Sub-divisional Magistrate of Narail stating that the Petitioner, Paresb Nath Biswas, and his son, Kalpada, had fenced in a portion of a public path and had obstructed another pathway by placing coal and sand thereon. The Sub-divisional Magistrate examined the complainant on oath and issued a notice on the Petitioner under sec. 133, Cr. P. C.

The Petitioner in showing cause against the order stated in his written statement, dated 10th March 1909, that the pathway was his private property, that a certain excavation by the side of the said path was in his own land and was demarcated by masonry pillars and that a fence was run along the said pillars on the Petitioner's land dividing the homestead land of the Petitioner from the pathway. On the 17th of March 1909, when the case came on for hearing a joint petition signed by both the parties was put in asking the Sub-divisional Magistrate to hold a local inquiry and agreeing to be bound by his decision. The learned Sub-divisional Magistrate went to the locality and after making inquiries of one person there made an order directing the Petitioner to set back the fence so as to leave a third of the width of the drain open at the side of the road.

A reference under sec. 438, Cr. P. C., was made by the Sessions Judge of Jessore recommending that the order might be set aside.

*Babu Sarat Chandra Lahiri* (with him *Babu Janaki Nath Pal*) in support of the reference contended:—

(1) The learned Sub-divisional Magistrate ought to have decided the question of *bona fides* raised by the Petitioner. (2) The order was based on no legal evidence, inasmuch as the evidence of the complainant was taken behind the Petitioner's back, and even that did not contain materials for making any order; the Magistrate did not take any evidence formally. (3) The Magistrate is bound under sec. 137, Cr. P. C., to take evidence before making a final order in the case. (4) Again, all that the Magistrate could do was to make the conditional order absolute. The arbitration was incompetent, as being opposed to law and public policy. The Magistrate could not compromise public rights. There is a sort of arbitration provided by the Code and of this the Petitioner ought to have been given the benefit. No waiver could give the Magistrate jurisdiction.

Their Lordships held that no valid order under sec. 133, Cr. P. C., was ever made and set aside the order complained of.

*Order set aside.*

**CIVIL APPELLATE JURISDICTION.** Before CHITTY and CARNDUFF, JJ. APPEAL FROM ORDER NO. 294 OF 1908. ASABAN BANU, Appellant v. NARAHARI BAINAB AND OTHERS, Respondents. Heard, 14th July and 2nd August. Judgment, 2nd August 1909.

*Compromise—Civil Procedure Code (Act XIV of 1882), sec. 244—Evidence Act (I of 1872), sec. 44—Order obtained behind the back of the Plaintiff, a nullity.*

The appeal arose out of an application by one Asaban under sec. 244, C. P. C., to set aside a sale on the ground of fraud. The applicant with her four brothers were the judgment-debtors. The property was sold and an application was made under sec. 244 to have the sale set aside on the ground of fraud. That application purported to have been signed not only by the four male judgment-debtors but also by the present Appellant. That matter was compromised between the judgment-debtors other than the present Petitioner and the decree-holder, but the compromise petition purported to have been signed by the present Appellant. Under that arrangement the Appellant's brothers entered on the property on fresh terms. The Appellant subsequently presented this application under sec. 244, C. P. C., for setting aside the sale. It was pleaded in bar of her application that she had already presented an application under the sections which had resulted in the compromise decree. The Munsif held that she was no party to the first application and that she was entitled in this proceeding to show that the compromise decree was obtained behind her back and in fraud of her right and that it was not binding on her. This decision was reversed on appeal.

*Held*—That the applicant was entitled in the present application to show that the former proceeding was one instituted and carried on by her brothers, that she had no part or share whatever in that proceeding and that, so far as she was concerned, it was a nullity: sec. 44 of the Evidence Act includes not only a suit but other proceedings, and there is nothing to exclude from the operation of that section a holding under sec. 244, C. P. C.

*Babu Harendra Narayan Mitter* for the Appellant.

*Babu Baikuntha Nath Das* for the Respondents.

A. T. M.

*Appeal allowed.  
Case remanded.*

**CIVIL APPELLATE JURISDICTION.** Before STEPHEN and CHATTERJEE, JJ. APPEAL FROM ORIGINAL DECREE NO. 484 OF 1907. MAIGAR SINGH AND ANOTHER, Appellants v. JOTI LAL SAHU AND OTHERS, Respondents. Heard, 10th and 11th August. Judgment, 11th August 1909.

*Res judicata—Jurisdiction—Erroneous decision.*

On the 21st November 1889, one Mohabir Singh mortgaged a portion of a certain mouza to one Jogi Lal for Rs. 250. On the 8th October 1890, one Jugdeo Narain executed a mortgage relating to 4 mouzahs including the one mortgaged before to Jogi Lal for the sum of Rs. 598. This mortgage was executed and registered and eventually came into the possession of the mortgagee. On the 16th February 1891, Jugdeo Narain again mortgaged two of the four mouzahs in question including the subject-matter of the first mortgage to the Plaintiffs for Rs. 275. So matters stood until either July or September in 1893 when Government revenue falling into arrears the property was put up for sale and was purchased by one Joti Lal Sahu, Defendant No. 1 in the present suit and the only Defendant who entered appearance. The Plaintiffs sought to execute their rights under the mortgage of the 16th February 1891 by bringing a suit against the sons of the mortgagor. The present Defendant No. 1 was joined as a necessary party to that suit by reason of his purchase at the revenue sale, and he set up the payment of Rs. 1,088 which he professed to have made to the mortgagee of the two mortgages of 1889 and 1890 in order to clear the estate which he had bought from previous incumbrance. A suit was brought before the Munsif and on the matter being tried out the plea set up by the present Defendant No. 1 failed and the Plaintiffs succeeded in getting a decree; on appeal this decree was set aside and the property being brought to sale under the mortgage was bought subject to the incumbrance of Rs. 1,088, by the present Plaintiffs, who thereupon ousted the Defendant No. 1. The Defendant No. 1 then sued the Plaintiffs before the Subordinate Judge for payment of Rs. 1,088 in respect of the mortgage of 1890 and Rs. 3,000 as regards the money paid in respect of the mortgage of 1889 enforcing the charge which had been found in his favour in the previous suit and it was held that the present Plaintiff was liable to the Defendant No. 1 for Rs. 1,088 and as regards Rs. 3,000 it was found on the facts that the contention put forward by the present Defendant No. 1 was baseless. The decision as to the Rs. 1,088 was given in accordance with the suit which had been originally brought before the Munsif, the Court holding that that matter had previously been in issue between the parties and had been decided and was accordingly *res judicata*. The Plaintiffs therefore sued to have

it declared that the original recognition of Defendant No. 1's right to the Rs. 1,088 was obtained by fraud, and to have him restrained from executing the decree in his favour. This suit was dismissed on the ground of *res judicata*. Against that decree an appeal was preferred to the High Court.

*Held*—It is established law that even if the former Court was in error in point of law the matter which such Court adjudicated on was for the purposes of the second Court *res judicata*.

*Parthasaradi Ayyangar v. Chinnakrishna Ayyangar* (I. L. R. 5 Mad. 304) and *Bishnu Priya Chowdhurain v. Bhoba Sundari Debya* (I. L. R. 28 Cal. 318) referred to.

*Babus Umakali Mukherjee and Dwarka Nath Mitter* for the Appellants.

*Babus Jogesh Chunder Roy and Braj Mohun Mojumdar* for the Respondents.

A. T. M. *Appeal dismissed.*

**CIVIL APPELLATE JURISDICTION.** Before STEPHEN and CHATTERJEE, JJ. APPEAL FROM ORDER NO. 321 OF 1909. MUSST. LAKHPATI KOER AND ANR., Appellants v. HARKHO SINGH AND OTHERS, Respondents. Heard, 11th and 12th August. Judgment, 18th August 1909.

*Appeal, if lies—Valuation in the sale proclamation—Decree.*

The appeal was from two orders made in execution proceeding for the realisation of a mortgage decree by sale of the mortgaged properties, settling the valuation to be published in the sale proclamation of the properties to be sold. It was contended in the High Court that no appeal lay under sec. 104 or O. 43, Rule 1, C. P. C.

*Held*—That the orders appealed from constituted "the determination of any question" within the meaning of sec. 47 and were decrees under sec. 2 (2) and an appeal lay.

*Rajeh Ramessur Prasad Narain Singh v. Rai Sri Kissen* (8 C. W. N. 257), *Sourendra Mohun Tagore v. Hurrah Chaud* (12 C. W. N. 542) and *Ganga Brood v. Raj Coomar Singh* (I. L. R. 30 Cal. 617) referred to.

*Mr. Sultan Ahmed, Dr. Suhrwardy and Babu Chandra Sekhar Persad Singh* for the Appellants.

*Babus Umakali Mukherjee and Joy Gopal Ghosh* for the Respondents.

A. T. M. *Appeal dismissed.*

# THE Calcutta Weekly Notes.

Vol. XIII.]

MONDAY, SEPTEMBER 6, 1909.

[No. 43]

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## Vacation Notices.

### ORIGINAL SIDE.

The High Court, Original Side, will be closed for the Annual Vacation (including Janmashtomi, Mohalaya, Fed-ul-Fitr, Lakh and Kali Pujah, and Bhadratritia on and from Friday, the 3rd September, to Saturday, the 13th November 1909, both days inclusive, and will resume its sitting on Monday, the 15th November 1909.

The Insolvent Court will sit on Tuesday, the 7th September, and Tuesday, the 5th October 1909.

The offices of the Court, Original Side, will be closed for general business for the Annual Vacation on and from Monday, the 13th September, to Saturday, the 6th November 1909, both days inclusive.

One Judge will remain in town for urgent business and arrangements will be made for the attendance of such superior and subordinate officers as may be required for the disposal of urgent business.

HIGH COURT, O. S.  
The 20th August 1909.

By order  
W. R. FINK,  
Registrar.

The undermentioned principal officers will be on duty during the vacation.

Applications for special appointment for the hearing of urgent chambers applications throughout the vacation should be made in writing to the master.

Mr. J. M. HECKLE

2, Hasting's Park Road, Alipur.

Applications for special appointments for the hearing of urgent matters other than chamber applications as above-mentioned should be made in writing.

From 3rd September to 9th September.

To

M. M. REMFRY,  
4, Randon Street.

AND

BABU GOPAL CHANDRA DASS,  
13, Duff Street.

From 10th September to 18th September.  
To

BABU GOPAL CHANDRA DASS,  
13 Duff Street.

### APPELLATE SIDE.

It is hereby notified that the High Court, Appellate Side, will be closed for the annual vacation from Friday, the third September, to Saturday, the 13th November 1909, both days inclusive.

The Hon'ble the Chief Justice, the Hon'ble Mr. Justice Cornduff and Hon'ble Mr. Justice Chatterjee will sit as the Vacation Judges, except during the following Court and Gazetted (Executive) holidays, viz.:

Gazetted holiday on ac-	Monday, the 6th September
count of Janmashtomi	1909.
Gazetted holiday on ac-	Wednesday, the 13th October
count of Mohalaya	1909.
Court holiday on account	Saturday and Sunday, the 16th
of Fed-ul-Fitr	and 17th October 1909.
Gazetted holiday on ac-	Monday, the 18th October,
count of Durga and	to Friday, the 29th October
Lukhi Pujahs	1909.
Gazetted holiday on ac-	Friday and Saturday, the 12th
count of Kali Pujah	and 13th November 1909.
Court holiday on account	Sunday, the 14th November
of Bhadratritia	1909.

Notice as to the days on which the Vacation Bench will sit for the hearing of motions and cases in which vakils are engaged and as to the distribution of business will be given from time to time.

The office of the Appellate Side will be closed for the vacation from Wednesday, the 13th October, to Sunday, the 14th November 1909, both days inclusive.

Such Translators, Examiners, Copyists and Assistants of the Record Department as may be required, will attend throughout the vacation, except on the Court's sanctioned holidays and the Gazetted holidays above specified.

A. W. WATSON,  
Offg. Registrar.

HIGH COURT,  
The 26th August 1909.

A NOTIFICATION IN THE India Gazette of 28TH August 1909 announces that His Majesty the King-Emperor has been pleased to appoint Digambar Chatterjee, Esq., at present acting as a Judge of the High Court of Judicature at Fort William in Bengal, to be a Judge of that Court, with effect from the 11th August 1909. We take this notification to mean that Mr. Justice Chatterjee who had been appointed to officiate for Mr. Justice Das has been made permanent in the office of a new Judge which has been sanctioned by the Secretary of State. The appointment of Mr. Chatterjee as an officiating Judge met with both professional and public approval. During the short time that he has been on the bench he has given proof of

high judicial qualities and it is only fit and proper that the new appointment should be given to him. With his patience, courtesy, legal learning and strong desire to do justice, he is sure to prove a source of strength to the Bench of the High Court. Apart from the question of personal fitness, the Government of India and the Secretary of State deserve the thanks of the community for adding to the numerical strength of the High Court.

IN THE SAME ISSUE OF THE *India Gazette* THE Government of India have published the rules framed by them from time to time under the Arms Act in a codified form. The necessity for such a step must be apparent to all those who have ever had occasion to look for any of the numerous Government notifications introducing a new rule of exemption or amending an already existing one. But the Government of India is not the only authority empowered to frame rules under the Act. It is quite as difficult to lay one's hand on a notification of a Local Government framing or amending a rule under the Act, and the Local Governments should lose no time in following the example of the Government of India in this respect.

WE PUBLISH IN ANOTHER COLUMN THE AMENDED rules relating to the registration of pleaders' and muktears' clerks in Mofussil Courts regarding which we commented in these columns some time ago. We invite attention to the prefatory note explaining the object of these rules.

THE NEW RULES FRAMED BY THE HON'BLE THE Chief Justice and the Judges by which the rules of the High Court on its Appellate Side have to a certain extent been modified are also published below. The amended rules relating to the admission of Vakils to practise on the Appellate Side clearly lay down that in no case will a candidate be admitted to practise as a Vakil without passing an examination by the Judges, and this rule applies equally to Attorneys, and Pleaders who have practised in a Mofussil District Court. The Judges also take power, in the exercise of their discretion, to accept a shorter period of service as an articulated clerk than two years for qualifying for such an examination.

OF THE OTHER AMENDMENTS THE MOST NOTICEABLE are, that taking away from a Judge sitting singly on the Appellate Side the power to refer a case to a Full Bench, and the additional powers conferred on him in the matter of hearing revisional applications under sec. 415 of the Civil Procedure Code. Formerly a single Judge could hear revisional applications under sec. 25 of the Provincial

Small Cause Courts Act only. Orders passed by a Judge of the High Court, sitting singly in revision are not appealable. Although the revisional powers of a single Judge is limited to cases valued up to Rs. 1,000 yet it may be open to the criticism that those seeking revision in matters of that value or less will not be able to reckon upon a bench of two Judges for the disposing of their petitions. We expect, however, that it is only occasionally that a single Judge will be called upon to exercise revisional powers.

THE MAY AND JUNE NUMBER OF THE *Madras Law Journal* opens with a very interesting article examining the statement of the Advocate-General of Madras, that "turning to the history of India whether ancient or medieval" there were "no glimpses of the existence of the legal profession." The learned writer of this article controverts this by quoting Sanskrit texts. Texts are cited from *Sukranitisara* to show that the employment of (*pratinidhi*) representative or agent to plead one's case was permissible.

SLOKA 108 OF THE SAID LAW TREATISE SAYS THAT "a plaintiff or a defendant who is unacquainted with legal practice and overburdened with work may employ an experienced representative or proxy (*pratinidhi*)." Sloka 109 similarly says that a relative or person appointed may urge a claim or make a defence on behalf of nervous, stupid, insane, aged persons, and females and invalids. Sloka 110 says that a suit may proceed in the presence of certain specified near relations. Sloka 111 provides that when anything is done by the person appointed it must be regarded as binding on the person appointing.

SUKRANITISARA THEN PROCEEDS TO PRESCRIBE the fees of the law agents (*pratinidhi*). Sloka 112 says that the fee of a *niyogi* (appointed person) varies from  $\frac{1}{10}$  to  $\frac{1}{100}$  of the value of the dispute. Sloka 113 explains that the fee must be reduced proportionately as the value of the suit goes on increasing. Where there are many advocates the fees ought to be otherwise specially arranged.

THE *Smitisara* THEN GOES ON TO PROVIDE punishment for the demand of more than the regulated fee and for other misconduct. Sloka 114 says that one knowing the law (*Dhurma*) and practice (*Iyabahara*) should be employed and no others and that a person so appointed (*niyogi*) receiving fees otherwise than on the scale fixed shall be punished. Punishment is also prescribed for persons so employed (*niyogi*) for misconduct in connection with the case by receiving bribe. Sloka 115 provides that a *niyogi* who through

avarice conducts a case otherwise than properly also deserves punishment. If this rule were to remain in force now it would surely furnish a salutary check on the undue prolonging of cases.

THE ABOVE SLOKA 115 ALSO SEEMS TO SUGGEST that people were free to select their advocates and the Crown could not appoint any person as a permanent advocate, for it says that "the king should not in accordance with his own will determine that a person should always be employed by others as *niryogi*." Sloka 116 seems to be heard on *amicus curiae*, for it says that if any person not being appointed as an advocate by the party, or not being a near relation of his, pleads or argues his case, he deserves to be punished. Most of the above rules are very modern in their spirit, but Slokas 119 and 120 which mention the cases in which an advocate was not allowed are quite archaic in their provisions. They provide that, for murder, theft, adultery, eating things not to be eaten, kidnapping or defaming a maiden, insult, perjury, forgery, offences against the king, robbery and rape a *prasthaidhi* is not allowed but the offending person should himself argue his own case.

OWING TO SOME DISTURBANCES AT PUBLIC MEETINGS at the close of the last year, a Committee was appointed in England to consider the duties of the Police with reference to the preservation of order at public meetings. The Committee has submitted its report. The conclusions of the report are of special interest to us in this country having regard to the recent attempt made in the Police Bill to give powers to the Police to interfere with public meetings. We take it from the *Justice of the Peace* of 14th August 1909 that the Committee has arrived at the conclusion that "for themselves they prefer the policy of non-interference with ordinary political meetings, although they recognise that on exceptional occasions it may become necessary or advisable to station police inside a meeting for the purpose of maintaining order."

THE RELATIVE RIGHTS OF THE CONVENERS OF A public meeting held indoors and those attending it are thus defined by the Committee.

For the purposes of their inquiry the Committee define a public meeting as including any lawful meeting called for the furtherance or discussion of a matter of public concern, to which the public or any particular section of the public is invited or admitted, whether the admission thereto is general or restricted. They then proceed to point out that such meetings when held indoors are seldom held in what is legally a public place, for even when a public building is hired or lent for the purpose to an association or promoters, it becomes in law for the time being a non-public place.

The result is that persons present at a public meeting so held are present only on the invitation of the promoters, and by their leave and license. They have no more right of entry in the first instance, and no more right to remain if requested by the promoters to leave, than if they had been invited to enter a private house by the occupier thereof. If they refuse to leave when called upon to do so by the chairman or representatives of the promoters they become trespassers, and may, after a reasonable interval, be removed (no undue violence being used); moreover, it appears to be immaterial that the person so requested to leave has paid for admission, and has not had his money returned. At such a meeting, therefore, the chairman, as representing the promoters, may call upon a man to leave, and stewards removing him (after refusal) at the chairman's order incur no liability, unless they use undue violence.

THE LEGAL POSITION OF THE POLICE AT SUCH meetings is thus stated by the Committee.

So far as the police are concerned the legal position is as follows: It is no part of a policeman's duty to eject trespassers from private premises; *qua* private citizen, he may, should he think fit, lawfully assist the occupier in ejecting them, if requested to do so. Similarly, in the case of public meetings on private premises, he may, but need not, carry out a chairman's directions. On the other hand it is a policeman's duty "to keep the King's peace." He may, and, indeed, ought to, intervene in the case of an actual breach of the peace. He may arrest without warrant a person whom he sees committing such a breach; and, even if he has not seen any such breach actually committed, he may arrest without warrant a person charged by another with having committed such breach, if there are reasonable grounds for apprehending the continuance or an immediate renewal thereof.

IF THE MEMBER IN CHARGE OF THE POLICE BILL meant to suggest in his concluding speech that public meetings are controlled in "every great modern city" in the manner such meetings are sought to be controlled under the Police Bill, the report of the Committee above referred to will at once convince him that he has been singularly misinformed with regard to this matter. It is not too much to say that non-interference with public meetings is the general policy pursued throughout the British Kingdom. The following is the nett result of the Committee's enquiry:—

First, there is the policy of "non-intervention," which the Committee prefer, and which is favoured in the Metropolis, Liverpool, Bristol, some thirty-five other towns, and thirty three counties. In such places it appears that the police are not permitted to enter public meetings, except in the case of a breach of the peace. An exception is, however, frequently made in regard to so-called "town's meetings," i.e., meetings of ratepayers held under the Borough Funds Acts, or similar statutes, and meetings called by the mayor in his official capacity to discuss matters of public interest. In fifteen counties and seventy-six boroughs police are sent to attend inside meetings (at any rate political ones) upon request of the promoters, and their services are charged for. Amongst such boroughs are Manchester, Blackburn, Bury, Cardiff, and Sheffield. In the remaining ten counties and fifteen boroughs (including Birmingham) the police attend inside meetings as part of their duty, and no special charge is made.

## Notes of Cases. ENGLISH LAW COURTS.

**COURT OF APPEAL.**—*Powell v. Helmsley.*  
Before the MASTER OF THE ROLLS, LORDS JUSTICES  
FARWELL and KENNEDY. 14th June 1909.

### *Breach of a restrictive covenant.*

This was the Plaintiff's appeal in a suit for an injunction to restrain the Defendant from building and for demolition of parts that had already been built.

A certain estate belonged to one Albert Ball. He conveyed a portion of it to the Defendant who covenanted for himself assigns etc. that he would not erect buildings on the land other than residential houses of a suitable character and that with the approval of the plan by Albert Ball. The Defendant subsequently sub-let a part of the land to Taylor and Fletcher who built houses thereon in violation of the covenant and shortly after became bankrupts. The Trustee in Bankruptcy disclaimed the lease with the result that the Defendant got possession of the houses. The Plaintiff who was assignee of Albert Ball together with the benefit of the covenant sued the Defendant. The defence was a denial of the Plaintiff's allegations. It was contended that even if the houses were built in breach of the covenants the Defendant was not liable.

THE MASTER OF THE ROLLS dismissed the appeal. He held that the Defendant had become a compulsory and unwilling purchaser of the property by reason only of the disclaimer of the Trustee in Bankruptcy. Since the Defendant had not done anything calculated to promote or encourage the breach so as to render himself liable for the violation of the covenant, the Plaintiff was not entitled to any relief against him either at law or in equity.

The Lords Justices concurred.

D. B. *Appeal dismissed.*

## CALCUTTA HIGH COURT.

### .. Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

**CRIMINAL APPELLATE JURISDICTION.** Before COXE and RYVES, JJ. CRIMINAL APPEAL No. 645 OF 1909. KALI KISHORE DEB, Appellant v. THE KING-EMPEROR. 31st August 1901.

*Penal Code, sec. 471—Offence under, when does not arise by using a forged document—Benefit of doubt.*

The Appellant was convicted by the Sessions Judge of Sylhet under secs. 420, 467 and 471, I. P. C., and sentenced to 2 years' rigorous imprisonment and a fine of Rs. 200 under sec. 467, I. P. C.,

and a further term of 1 year's rigorous imprisonment under sec. 471, I. P. C., the sentences to run consecutively. No separate sentence was passed under sec. 420, I. P. C.

It appears that the Appellant made over to the complainant a *kobala* alleged to have been executed by certain persons by which they purported to convey their right to certain surplus sale-proceeds to the extent of Rs. 500 that were lying in deposit in the Collectorate. It was proved in the case that these alleged vendors had no right to the surplus sale-proceeds to which their mothers were entitled. The complainant alleged that the accused took from him Rs. 90 as the consideration for the *kobala* which purported to have been executed in favour of the complainant. Ultimately the complainant coming to know that the *kobala* was a forgery lodged complaint against the accused. Previously the complainant had brought a suit on a bond against the accused in which the accused had filed a written statement and given his deposition in both of which he had stated that he had got the *kobala* executed in favour of the complainant. It was proved in the case that the body of the *kobala* and the signature of one attesting witness were in the handwriting of the accused but it was not proved who forged the signatures of the alleged vendors and another attesting witness.

Babu Brojendra Nath Chatterjee contended on behalf of the Appellant that the facts and the circumstances showed that the complainant was privy to the forgery, and as it was found that the accused only wrote out the body of the *kobala* and signed the name of one attesting witness, but the signatures of the alleged vendors were not forged by him, the accused could not be held guilty of forgery because the portion of the document which he made was devoid of any legal effect as it did not contain the signatures of the alleged executants. It might be that the accused after writing out the body and signing the name of one witness kept it with another person, (he might be the complainant himself) who subsequently forged the names of the alleged vendors. If there is any reasonable ground for suspecting that the complainant was privy to the forgery, the accused should not be convicted under sec. 471 for giving the document to the complainant because the complainant could not possibly regard it as genuine. Also as the accused had been convicted under sec. 467, he could not be convicted under sec. 471, as that section contemplates a person other than the person who committed the forgery and the accused should have the benefit of doubt as regards the offence under sec. 420.

Mr. Orr, The Deputy Legal Remembrancer, on behalf of the Crown contended that the accused had been rightly convicted under secs. 420 and 471, but he left the question of sentence under those sections in the hands of their Lordships.



Their Lordships on the evidence and on the admissions of the accused in the bond suit, held that there was no doubt that the accused committed forgery, but observed that as possibly the complainant may have been privy to the forgery the accused ought not to be convicted of the offence under sec. 471, I. P. C., by making over the document to the complainant and of the offence of cheating. In this view the convictions under secs. 420 and 471 were quashed the sentence of one year's rigorous imprisonment under sec. 471 was set aside, but conviction and sentence under sec. 467 were upheld.

*Sentence reduced, convictions under secs. 420 and 471 set aside.*

**HIGH COURT. PRIVY COUNCIL APPEAL No. 58 OF 1908.** IN THE MATTER OF THE APPOINTMENT OF A RECEIVER IN REGARD TO THE TEMPLE PROPERTIES AT HARMANDIL SIKH TEMPLE AT PATNA. TEGHA SINGH, Plaintiff, Appellant v. BICHITRA SINGH, Defendant, Respondent. 31st August 1909.

*Receiver, appointment of—Privy Council—Appeal under special leave—Seisin of the appeal—Jurisdiction of High Court.*

This was an application by the Plaintiff Appellant to have a Receiver appointed of the properties of the Harmandil Sikh Temple in Patna, of which the Defendant had been appointed manager by the District Judge of Patna under Act XX of 1863 (The Religious Endowments Act). The Plaintiff claimed these properties on the ground that he was the rightful Mohunt of the temple, and was entitled to succeed upon the death of the late Mohunt, his uncle, Dharam Singh, on the ground that he was the duly nominated *chela*. His suit was dismissed by the Subordinate Judge on the 30th of June 1904. He appealed to the High Court (Appeal No. 546 of 1904) which was also dismissed on the 20th of December 1905. The High Court refused leave to appeal to the Privy Council on the 24th of July 1906. The Privy Council, however, granted the Appellant special leave on the 10th of December 1907, and his appeal was registered on the 8th of December 1908, and is now pending before the Privy Council. The application was on notice to the Defendant-Respondent for the appointment of a Receiver pending the hearing of the Privy Council appeal. Various grounds were alleged by the Plaintiff as to why a Receiver should be appointed.

*Babu Hariendra Narayan Mitter* (with him *Babu Hari Bhushan Mukherjee*) for the Petitioner.

*Mr. A. Chaudhuri* (with him *Mr. S. K. Mullick* and *Babu Gonesh Dutt Singh*) for the Respondent contended that the High Court had no jurisdiction to entertain the application. The High Court had held under sec. 608, C. P. C. (Act XIV of 1882),

that there was no jurisdiction, as the Privy Council had seisin of the appeal. [See *Mohesh v. Sairughan*, 4 C. W. N. 34 : s. c. L. R. 26 I. A. 281, 283; I. L. R. 27 Cal. 1 (1899)]. He also referred to *Laliteswar Singh v. Bhabeswar Singh*, 13 C. W. N. cclxxv, P. C. (1909) and also L. R. 33 I. A. 132 (1907). Order 41, Rule 5, and Order 45, Rule 13. There had been no change in the law. He also contended that on the merits there should be no Receiver.

*Babu Hariendra Narayan Mitter* in reply contended that upon the admission of an appeal by the Privy Council, the appeal was filed and numbered by the High Court, which had charge of the preparation of the paper-book amongst other things, and therefore, after such leave, the position of such an appeal for every purpose was the same as of an appeal admitted by the High Court itself. He further contended that there had been a change in the law, the words now being "notwithstanding the grant of a certificate for the admission of an appeal," in the place of the words in the old Act "notwithstanding the admission of any appeal," which indicated that the law had been altered. It covered the case of an appeal admitted by special leave of the Privy Council. Various matters had to be done by the High Court after the admission of such an appeal, and these were done by the High Court under the Rules.

MOOKERJEE, J., in delivering his judgment, observed that the change in the words of sec. 608 was to avoid the difference of opinion which had arisen between the Calcutta High Court and other High Courts about the power of the Court, pending an application for a certificate, and before the actual admission of an appeal, and further that all the Rules under Order 45 up to Rule 13 related to appeals admitted by the High Court. Sec. 112 of the present Act provided that the Rules of the Privy Council were not affected in any way by the Civil Procedure Code. Security required under such an appeal was filed in England, and not in the High Court and the paper-book was prepared in India under the order directing the admission of the appeal by the Privy Council. Whatever was done by the High Court was under the direction of the Privy Council. His Lordship held that it had no jurisdiction to entertain such an application and added that in their opinion there was no merit in the application.

VINCENT, J., agreed.

P. R. C.

*Application rejected.*

**CIVIL APPELLATE JURISDICTION.** Before JENKINS, C. J., and CAMPBELL, J. LETTERS PATENT APPEAL No. 160 OF 1909. SARBANANDA DAS AND OTHERS, Defendants, Appellants v. GOPAL CHANDRA CHAUDHURI AND OTHERS, Plaintiffs, Respondents. 5th August 1909.

*Civil Procedure Code (Act XIV of 1882), sec.*

392, 393—*Local investigation by Commissioner—Boundary dispute—Commissioner if may decide dispute without recording evidence—Report of Commissioner and map prepared from information received on the spot—Value and use as evidence.*

This was an appeal against a decree of the Hon'ble Mr. Justice Brett, dated the 20th of January 1909, in appeal from Appellate Decree No. 1014 of 1907.

The Plaintiffs sued to eject the Defendants, their tenants, from certain plots of land which they alleged to be their *khas* lands and upon which they said the tenants had wrongfully encroached. In support of their case they relied on a certified copy of a pattah granted by them to the predecessors of the tenants. The Munsif held upon the evidence that the lands in question were not proved to be within the plots specified in the pattah and decreed the suit. On appeal the Subordinate Judge directed a local inquiry under sec. 392 of the Civil Procedure Code of 1882, the order to the Commissioner being to "prepare a map of the disputed land according to the boundaries given by the plaintiff and also to compare the boundaries of plots Nos. A to F marked in red ink in Exhibit (1) (the certified copy of the *pattah*) and to show them in the map." The Commissioner submitted a report with a map. The Subordinate Judge in disposing of the appeal observed: "The boundaries of the disputed lands as made out by the Commissioner appear to me to be correct. . . . On the whole I am satisfied that the Defendant has not encroached upon any lands without the Plaintiff's knowledge and consent." He accordingly decreed the appeal and dismissed the suit. On second appeal Brett, J., observed that no evidence had been taken by the Commissioner, and he appears to have prepared the map on information received on the spot and that in the map he showed the position of the plots covered by the lease as represented by the Plaintiffs and the Defendants respectively; that the Subordinate Judge ought not to have disposed of the case as he did, entirely upon his view of the report of the Commissioner; that he also erred in not allowing the Plaintiffs to substantiate their objections to the report by adducing evidence. In the result he remanded the case with directions for allowing the Plaintiffs to adduce evidence to support their objections against the Commissioner's report and the Defendants to adduce rebutting evidence.

An appeal having been preferred under the Letters Patent by the Defendants, the Plaintiffs-Respondents preferred cross-objections.

*Babu Mohendra Nath Ray* (with him *Babu Lalit Mohan Ghose*) for the Appellants submitted that the finding of the Subordinate Judge being one of fact, could not be set aside on second appeal. The Commissioner's report was evidence on the authority of this Court. See Civil Procedure

Code, secs. 392, 393, 6 W. R. 51, 7 W. R. 43. [The CHIEF JUSTICE referred to 24 Bom. 43]. That is not the view taken in this Court, and that case is distinguishable.

*Babu Nalini Ranjan Chatterjee* (with him *Babu Nagendra Nath Ghosh*) for the Respondents was not called upon to reply on the appeal. He supported the cross-objections.

His Lordship the CHIEF JUSTICE in delivering judgment observed:

"What the Commissioners did was to prepare a map and to show the boundaries as described to him by the Plaintiffs and also as described to him by the Defendants. These boundaries naturally do not agree. But the Commissioner cannot be taken to have decided what the true boundary was. If he had then he would not have acted in accordance with law; because he would have decided a point in contest between the parties on their unworn statements and without recording their evidence. Having regard to the small value of the subject-matter in litigation it is very desirable to come to some conclusion that will not encourage further litigation beyond what is absolutely necessary. I think the proper order will be not to allow the parties to adduce further evidence . . . but to let this case go back to the lower Appellate Court, there to be decided upon the evidence on the record, that is to say, the evidence in the first Court. The learned Judge will be entitled to look at the map, so far as it may help him to read and understand that evidence, but he must not accept the report of the Amin as decisive of the boundaries which are in dispute in this case."

N. G.

*Decree varied accordingly.*

## High Court Notice.

### NOTIFICATIONS.

The following rule, passed by the High Court of Judicature at Fort William in Bengal, is published for general information.

By order of the High Court,

A. W. WATSON,  
Offg. Registrar.

### IN THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

#### (CIVIL APPELLATE JURISDICTION.)

It is ordered that the following amendments be made in the Rules as to "Constitution of Division Courts and Full Benches" contained in the Rules of the High Court, Calcutta, Appellate Side, published in Part I, page 1523 *et seq.* of the *Calcutta Gazette* of the 19th November 1902:—

1. To cl. 5 of Sch. I "(Civil Work)" in the 1st proviso to Rule 1, Chap. II, Part I, at p. 7 of the said Rules, add the following:—

"and applications for revision under sec. 115 of the Code of Civil Procedure, in cases up to that value, and of all Rules granted on such applications."

2. For cl. 7 of the said schedule substitute the following:—

(7) Appeals against the following orders as referred to in Order XLIII, r. 1 of the Code of Civil Procedure:—

(a) Orders under rule 10 of Order VII returning a plaint to be presented to the proper Court [Or. XLIII, r. 1 (a)].

(b) Orders under rule 21 of Order XI [Or. XLIII, r. 1 (f)].

(c) Orders under rule 10 of Order XVI for the attachment of property of witnesses [Or. XLIII, r. 1 (g)].

(d) Orders under rule 3 of Order XXIII recording or refusing to record an agreement, compromise, or satisfaction [Or. XLIII, r. 1 (m)].

(e) Orders under rule 2 of order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit [Or. XLIII, r. 1 (n)].

(f) Orders under rule 3 or rule 8 of Order XXXIV refusing to extend the time for the payment of mortgage-money [Or. XLIII, r. 1 (o)].

(g) Orders under rule 3 or rule 6 of Order XXXVIII [Or. XLIII, r. 1 (q)].

(h) Orders under rule 10 of Order XXXIX [Or. XLIII, r. 1 (r)].

3. For the words "three Judges" in the last paragraph of Rule II, Chap. II, Part I, at p. 8 of the said Rules substitute the words "two or more Judges as the Chief Justice may determine," and strike out the proviso to the said Rule.

And it is ordered that Rule I, Chap. V, Part II of the Rules as to "References to a Full Bench," at p. 25 of the said Rules of the High Court, be amended by striking out the words "or a Judge sitting singly" in lines 1 and 2 and the words "or any other Judge sitting singly as aforesaid" in lines 3 and 4 of the said Rule 1.

The 17th August 1909.

The following Rule, passed by the High Court of Judicature at Fort William in Bengal, is published for general information.

HIGH COURT, CIVIL, By order of the High Court, A. W. WATSON, Registrar.  
The 18th August 1909.

It is ordered that the "Rules of the High Court, Appellate Side," published in Part I, pages 1523 to 1583 of the *Calcutta Gazette* of the 19th November 1902, be and the same are hereby amended as follows, *vis*—

1. In the second line of Rule 1, Part V, Chapter XVI, at p. 100, after the word "shall," insert the words "unless otherwise qualified under Rule 23."

2. In the seventh line of Rule 2, in the same Chapter and page, after the words "two years," insert the words "unless the Court, for special reason, think fit to remit any portion of such period."

3. Cancel Rule 11 in the same Chapter at page 102, and substitute therefor the following:—

11. Every person entitled to serve as a clerk to a Vakil for the purpose of being admitted as a Vakil shall, unless the Court thinks fit to grant him a special dispensation, be, during the whole period of service, exclusively employed by the Vakil in his proper business and practice as such.

Service under articles, original or assigned, shall be continuous, unless the previous sanction of the Court is obtained to an interruption thereof or unless an interruption permitted by the Vakil, but not so previously sanctioned, is subsequently explained to the satisfaction of the Court and condoned.

4. In the subjects noted in the margin of Rule 16, in the same Chapter, at p. 103, cancel "The Contract Act," "The Bengal Tenancy Act," "The Transfer of Property Act," and "The Specific Relief Act" and insert therein "Such portions of the Bengal Tenancy Act as deal with matters of procedure."

5. Insert the following as a proviso to Rule 19, in the same Chapter, at p. 104, *vis*—

Provided that no pleader shall be admitted as a Vakil of the High Court without passing the final examination prescribed by Rule 16.

6. Cancel Rule 23 in the same Chapter at p. 105, and substitute therefor the following:—

23. Any Attorney of the High Court who establishes to the satisfaction of the Court that he has *bond fide* practised as such for a period of three years and that he is a person of good character and ability, may be admitted to practise in the High Court as a Vakil:

Provided that no Attorney or other person shall be admitted as a Vakil of the High Court without passing the final examination prescribed by Rule 16.

7. The above amendments shall take effect as from the 5th July 1909.

### General Letter No. 19

To THE DISTRICT JUDGE OF THE DISTRICT MAGISTRATE

Dated Calcutta, the 28th August, 1909.

SIR,—The experience of the past year having shown that the rules prescribed in General Letter No. 5 (Civil), dated the 19th May 1908, and General Letter No. 4 (Criminal), dated the 27th August 1908, in regard to the registration of Pleaders' and Mukhtears' clerks, respectively, have been, in some instances, misunderstood, and that they require certain modifications, the Chief Justice and Judges have decided to issue a fresh set of rules applying to the clerks both of Pleaders and Mukhtears, and these I am now directed to forward for your information and guidance and for communication to the Subordinate Civil and Criminal Courts in your district.

2. It would clearly not be possible to place any restriction on the employment of clerks by legal practitioners save in so far as their employment necessitates their recognition as privileged persons by the Courts, and the amended rules aim at nothing more. They make it clear that only the recognised employees of Pleaders and Mukhtears are to be allowed access to the Courts and offices, and they give power both to the District Magistrate and to the District Judge to remove any such clerk from the register for sufficient reasons to be recorded in writing. It is hoped that the presiding officers of the Civil and Criminal Courts will see that full effect is given to the revised rules, and that it may now be found possible through them to deal more effectively with the evils resulting from the hitherto almost uncontrolled activities of persons who dishonestly obtain access to the Courts and their offices on the ground that they are Pleaders' clerks.

3. Officers presiding over Courts should be careful to explain to their subordinates the contents of the Bengal Judicial Department Circular, No. 2970-J., dated the 15th April 1901. Due attention, it is feared, has not been paid to that Circular, and every effort should now be made to arrange for the structural alterations necessary to give effect to the requirements therein laid down.

4. General Letters No. 5 (Civil), dated 19th May 1908, and No. 4 (Criminal), dated 27th August 1908, are hereby cancelled.

I have the honour to be,

SIR,

Your most obedient servant,

A. W. WATSON,

Officiating Registrar.

### Rules for Pleaders' and Mukhtears' Clerks.

1. In these rules, the expression "recognised clerk" means a clerk employed by a Pleader or Mukhtar and permitted, as such, to have access to the Courts in which his employer is authorised to practise, and to the offices attached thereto.

2. Not more than one clerk at a time in the case of a Mukhtar, and not more than two clerks in the case of a Pleader, shall ordinarily be recognised.

3. The District Judge shall maintain a register of all recognised clerks employed in the district, and to each re-

cognised clerk shall be given, under his orders, a card in the form set forth as Appendix I. to these Rules. These cards (which shall be strictly non-transferable) shall be recalled for renewal at the close of each year.

4. The register prescribed by rule 3 shall contain the name, father's name, and residence of each recognised clerk, the date of his registration, the name of the Pleader or Mukhtear by whom he is employed, the Courts in the district in which his employer is authorised to practise, and a column for remarks. It shall be kept in two parts, the first for Pleaders' clerks, and the second for Mukhteers' clerks, and copies of it shall be supplied by the District Judge at the commencement of each year to the District Magistrate and to each Subdivisional Office and outlying Munsifs. Copies shall also, if necessary, be furnished to the various Courts at the Sadar Station.

5. No clerk employed by a Pleader or Mukhtear shall, as such, be allowed access to any of the Courts of the district, or to any of the offices attached thereto, unless he is for the time being a recognised clerk.

6. The District Judge in any case, and the District Magistrate in the case of Mukhteers' clerks, may—for reasons to be recorded in writing, and after hearing the clerk in his defence, if he so desires—order the removal from the registers of any recognised clerk and the cancellation of his card; and on the passing of such order, the clerk shall cease to be a recognised clerk. Every such order passed by the District Judge shall be communicated to the District Magistrate, and *vice versa*; and the necessary steps shall be taken for the alteration accordingly of the register and the copies thereof.

*N.B.*—Proceedings taken against clerks under this rule, are administrative and not judicial proceedings.

7. No person, whose name has been struck off the register, shall be recommended for registration by any Pleader or Mukhtear at the same or any other station.

8. On or before the date on which these rules come into force, every Pleader or Mukhtear practising, in any of the Courts subordinate to the High Court, other than the Calcutta Small Cause Court, shall report to the District Judge the names or name of the two clerks or clerk whom he desires to have recognised; and the register shall, in the first instance, be prepared accordingly.

9. When submitting his report under rule 8, the Pleader or Mukhtear shall certify that the persons or person proposed are or is, to the best of his belief, fit to be so employed and will be employed *bona fide* in his own service and for the purpose of his legal business. No clerk registered as the clerk of one Pleader or Mukhtear, shall do business in the Courts, or offices thereof, on behalf of any other Pleader or Mukhtear.

10. If on the death, retirement, or dismissal of any recognised clerk, a Pleader or Mukhtear wishes to entertain another clerk in his place, he shall apply for his recognition as required by rule 8, and the certificate required by rule 9 shall be furnished in regard to all such persons as may be recommended hereafter for recognition under these rules.

11. Nothing in these rules shall be deemed to authorise indiscriminate entry into the offices attached to the Courts or any violation of the orders contained in the Government of Bengal's Circular, No. 1459-J., dated the 13th February 1901, which was published in the *Calcutta Gazette*, dated the 17th April 1901, Part IV A, page 3, and is reproduced as Appendix II of these rules.

12. These rules shall come into force on the 1st January 1910.

## Appendix I.

*No. to correspond with No. in Register.	Registered Clerk's Card No.*
	NOT TRANSFERABLE.
This is certify that	
son of	of
residing at	now residing at
is a recognised Clerk employed by	
	Pleader Mukhtear
and that he is	
To be filled up according to the circumstances of each case as the District Judge may deem fit.	entitled to have access to
	and to the offices attached thereto
	Dated the
	A. B.,
	Sherristadar,
	District Judge's Court.

## Appendix II.

Circular No. 1259-J., dated Calcutta, the 13th February 1901.  
From—C. E. BUCKLAND, ESQ., C. I. E., Officiating Chief Secretary to the Government of Bengal.  
(Judicial.)

SIR,—I am directed to say that the following rule has been issued by the Government for incorporation in the Revenue Officers' Manual:—

"With a view to the better conduct of business in Collectorate offices, the Lieutenant-Governor has been pleased to order that at the entrance of each office-room occupied by Clerks or Mohurirs or Copyists shall be placed a wicket gate with a spring. Inside each such office is to be kept a list shewing who were the officers entitled to occupy the room. Outside the entrance to the room should be hung in a conspicuous place a board, having printed on it, both in English and Vernacular, 'No admittance for the public.' The Collector and the Deputy Collectors in charge of a department should visit at unstated times during office hours the room occupied by its subordinates and call the roll; and, in the event of his finding any outsiders within the room, the ministerial head of the department should be punished since he is to be held responsible that the public do not enter the room."

2. The Lieutenant-Governor desires that the above instructions should be followed by all Civil Courts for the better conduct of business in their offices, and I am to request that you will be so good as to issue the necessary orders in the matter.

# THE Calcutta Weekly Notes.

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### REPORTS (See Index.)

WE INVITE ATTENTION TO A LETTER IN OUR CORRESPONDENCE COLUMN REGARDING THE APPOINTMENT OF pleader-commissioners in the mofussil.

MR. W. TEUNON, DISTRICT JUDGE, EASTERN Bengal and Assam, now on leave, and for some time Legal Remembrancer and a Member of the Council in that province has been appointed to officiate as a Judge of the Calcutta High Court in the place of Mr. Justice Cox who has gone home on long leave. Mr. Teunon is a Civilian and a Judge of considerable experience. He was in the charge of the Eastern Bengal and Assam Tenancy Amendment Bill when that measure was passed into law, as we noticed at the time, the Amending Act of the Eastern Bengal Council was in many respects an improvement on the Amending Act of the Bengal Council, and for these improvements credit was largely due to the Hon'ble Mr. Teunon.

EARLY MARRIAGE IS AN INSTITUTION WHICH IS not peculiar to India. We publish a very interesting article from the *Canadian Law Times* which shows how it was common to other countries and was recognised by the laws of England. Issues incidental to such marriages are discussed by Littleton & Coke and references to them are also to be found in Blackstone's Commentaries. Such marriages were known in England even in Tudor times. It is only within the last four centuries that such marriages have fallen into disuse in England. Even in this country the marriageable age of girls have rapidly advanced within recent times. For-

merly the average marriageable age of a girl in Bengal was between 8 and 10 but now the instances where girls are married below the age of 12 are very few and in many instances girls attain the ages of 13 to 15 before they can be married. We must however mention that it is not purely the spirit of social reform but rather the reluctance amongst the educated youths of the country to marry early and the difficulty of parents in finding a suitable match that has caused a corresponding rise in the marriageable age of girls in these provinces.

AMONGST THE MANY ANOMALIES OF THE PARTITION of Bengal, the division of the Provincial Judicial Service of the two provinces must be regarded as one. This division has taken effect from the 1st of January 1909, although the officers transferred from one province to another have joined their new posts in April after the Easter holidays. As an inducement to members of the service to accept appointments in the new Province, the local Government has added a new grade of Rs. 500 for the Munsifs. It will be remembered that we have long pressed for the creation of this grade for the Provincial Judicial Service generally as an act of bare justice to its members. But now that it has been given as a solatium to members who have taken service in Eastern Bengal and Assam, those who are serving in Western Bengal apprehend that the creation of this new grade for the old province might be postponed in order to make service in the Eastern Province pecuniarily more attractive. It is not fair, however, that any class of public servants should get preference over their brethren simply because the Government blundered in effecting an arbitrary partition of the Province.

THE ABOVE ARRANGEMENT HAS NOT ONLY CREATED a difference in the position and prospects of the Munsifs in the two provinces generally, but the injustice is felt through all the grades of the service in the old province. Officers in the new province who were juniors in service have been promoted to the Rs. 500 grade over the heads

of senior officers still working in their former grade in the old province. The vacancies thus created in the lower grades have been similarly filled up by officers from the lower grades of the Eastern province service over the heads of the senior officers still working in their former grade in the old province. Two vacancies in the first grade of Subordinate Judges of the Western Province which occurred on the 1st January last were filled up from the officers of lower grades in the same province but the Munsifs of this province got no benefit under it. It is only two of the Munsifs in the new province who got a lift to the Rs. 500 grade through these vacancies. A further grievance of the service is that the *sub pro tem* promotions that formerly used to be given when an appointment of a Subordinate Judge was temporarily sanctioned have now been discontinued causing much hardship to the Munsifs. The grievances of these hard-worked officers deserve the sympathy of the Hon'ble Judges of the High Court as also of Government.

### CHILD MARRIAGES.

Diogenes on being asked "At what time of a man's life is it best to marry?" replied, "In youth it is too soon, and in age it is too late," and ever since that old cynic's day "the time when" has agitated would-be spouses.

Travellers tell us that so soon as an Eskimo girl is born, the young lad who wishes to have her for his wife goes to her father's tent and proffers himself. If accepted a promise is given which is binding, and she is given her betrothed when of proper age. Early betrothals are among the established customs of many others of the American peoples, both North and South; among some negro tribes the marriage of infants is often arranged directly after birth; among the Ashantees, Bushmen, the peoples of New Guinea, New Zealand, Tahiti and many of the Malay islands, and Australians, girls are often betrothed before they are born; this, too, is sometimes done in China. In India infant marriage was long a common custom. Professor Cambery says that all peoples of the Turkish stock are in the habit of betrothing babies. Among some of the tribes of Siberia and among the Jews of Western Russia, parents betroth the children they hope to have.

Doubtless all Anglo-Saxons of the twentieth century gasp at such statements and exclaim, "How could these things be? Shocking very shocking!" Well this paper is to be anent Anglo-Saxon babies and infants who, according to Jefferson, "were often mated in the cradle, ringed in the nursery and brought to the church porch with lollipops in their mouths;" or as a writer in England (1593) says: "Little infants in swaddling

clouds are often married by their ambitious parents and friends, when they know neither good nor evil."

The Canonists fixed the age of consent at seven years. Any marriage after that age, without the consent of parent or guardian and even in opposition to it, was held legal: but it was voidable so long as either of the parties to it was below the age at which it could be consummated. A presumption fixed this age at fourteen for boys and twelve for girls. In case only one of the party was below that age, the marriage could be avoided by that party but was binding on the other, and Pollock and Maitland say, "so far as we can see, this doctrine was accepted by our temporal Courts." (History of English Law, II., p. 388).

Blackstone states the law as follows: "If a boy under fourteen or a girl under twelve years of age marries, this marriage is only inchoate and imperfect; and when either of them comes to the age of consent (fourteen and twelve respectively) they may disagree and declare the marriage void, without any divorce or sentence in the spiritual Court. This is founded on the civil law. But the canon law pays a greater regard to the constitution than the age of the parties: for if they are *habiles ad matrimonium*, it is a good marriage whatever the age may be, and in our law it is so far a marriage that if at the age of the consent they agree to continue together they need not be married again. If the husband be of years of discretion and the woman under twelve when she comes to years of discretion he may disagree as well as she may, for in contracts the obligation must be mutual; both must be bound or neither; and so it is *vice versa*, when the woman is of years of discretion and the husband under."

That the Anglican Church, in early days, approved of very early marriage is evident from the benedictions and prayers in her marriage ritual. In blessing the wedding ring the priest prayed, that the bride might live, flourish, grow old and have length of days. But in his final supplication after asking the Almighty to bless *these young people*, he implored (according to the Sarum Use) "Look, O Lord, with thy favour on this thy man-servant and this thy handmaiden that in thy name they may receive the heavenly benediction, and in safety see the sons of their sons and their daughters even to the third and fourth generations." Either the English in those days lived far beyond the allotted time, as stated by the Psalmist, or they took upon themselves the cares of wedlock very early in life, if the priest really expected his prayer to be heard and answered.

Eleanora, the ninth daughter of Edward the first, was only four days old when she was espoused by her august father to the son and heir of Otto, late Earl of Burgundy and Artois, who was himself a child in the custody of his mother. The baby

princess became a spouse before the first anniversary of her birth : but died in her sixth year.

In Henry III.'s day a marriage between a boy of four or five years and a girl who was no older, seems to have been capable of ratification, and as a matter of fact parents and guardians often betrothed or attempted to betroth children who were less than seven years old. And the Church only mildly said—let no babies in the cradle be given in marriage unless, indeed, under the pressure of some urgent necessity, according to the Canon of Pope Nicholas—in the English Canons of 1175 and 1236—“*nisi forte aliqua urgentissimo necessitate interveniente.*” Peace was such a need, and oft-times the chubby hand of a child was used in wedlock to patch up a peace between warring princes and wrangling subjects. Then, too, a father in view of death would marry his infant heiress to save his estate from all the expenses and his daughter from the hardships of the feudal wardship of his overlord. In 1477, Edward IV married his “intierly beloved second son, Richard,” Duke of York (the younger of the princes, murdered in the Tower by Richard III.), at four years old, to Anne Montray, daughter and heiress of the Duke of Norfolk, who was then under six.

Pollock and Maitland enliven their history with a story *apropos* of how the lord gave his wards in marriage. Sir Thomas of Saleby, a worthy Knight of Lincolnshire, was old and childless and it seemed that his lands must pass to his brother William ; but his wife determined otherwise, so she took to her bed, had a villager's babe smuggled in and announced to the family that she had borne a daughter. The neighbours were doubting Thomases and told Bishop Hugh ; he sent for the knight and threatened him with all the horrors of excommunication if he kept the child Grace as his own. Sir Thomas feared his wife more than either God or the Bishop, therefore he followed her wishes and of course died a sudden death. But Sapphira was not warned by the death of Ananias. The King gave the heiress to one Adam Neville, the chief forester's brother : when Grace was four years old Adam proposed to marry her : the Bishop again interfered, but when he was away in Normandy a priest performed the ceremony. The Bishop on his return was furious and scattered excommunication with a free hand. Then the widow and her maid confessed the fraud, but Adam upheld his baby-wife's rights and confidently appealed to the law—Sir Thomas had received Grace as legitimate, so legitimate she was ; the Bishop, while in England, was able to secure the law's delay : but again he had to cross the narrow seas ; Adam pushed for judgment and seemed at the point of winning when—click went the scissors of Atropos, and the thread of wicked Adam's life was snipped. But neither Grace nor the lawful heir was the whit the better for this—for King John

sold Grace to his chamberlain Norman for 200 marks (a mark being about 13 shillings of that day), and when Norman died the poor girl was sold for 300 marks to Brien de Lisle, the last and worst of her husbands ; last of all the woman died also, and then the right heir came to his own. (Pollock & Maitland, II., page 389).

Coke tells us plainly that a nine-year old widow is entitled to her dower “of what age soever her husband be, albeit he were but four years old :” and this is good law, even though the marriage was one which he could have voided when she reached the age of twelve. Coke also says : “If a man taketh a wife of the age of seven years and after alien his land, and after the alienation the wife attaineth to the age of nine years, after the husband's death the wife shall be endowed : for albeit she was not absolutely dowable at the time of her marriage, yet she was conditionally dowable, *viz.*, if she attained to the age of nine years before the death of her husband, for so Littleton here saith, so that she pass the age of nine years at the death of her husband for by his death the possibility of dower is consummate.”

Furnivall's book on “Child Marriages, Divorces and Ratifications, &c.” (published by the Early English Text Society), shews the astonishing frequency of child marriages in the days of the Tudors : in the single diocese of Chester in the six short years 1561-66, when the maiden queen was on the throne, the Bishop's Court granted twenty-eight divorces, or voidance of marriage contracts, the parties ranging from two to thirteen years of age. In ten of these cases the girl was older than the boy. And these marriages were only those brought before the Court for annulment, or confirmation, when one had reached the age of consent. As Mr. Furnivall says, to these cases in which marriage was a failure in the diocese of Chester we owe the records which he publishes : he adds, “No doubt scores of others ended happily : the child husband and wife lived on together, and when they had reached their years of discretion or attained puberty ratified their marriage ; that it is only fair to assume that the number of such cases which never came before the Bishop's Court was larger than of those which did.” The majority of these marriages occurred, not among the rich and noble, but among the common people and the comparatively poor.

The records quoted contain the depositions of a witness who assisted at the marriage of John Somerforth and Jane Brerton. He says : “he was present, when John Somerforth and Jane Brerton were married together at the parish church of Brerton about xij yeres ago—that he carried the said John in his armes, beinge at the time of the said marriage about iij yeres of age, and somme of the wordes of matrimonye, that the said John, bye reason of his yonge age, did not



speak hymselfe, holding hym in his armes all the while the wordes of matrimonie were in speakinge." "And one James Holford carried the said Jane in his armes, being at the said tyme about ij yerres of age, and spake all or the most parte of the wordes of matrimonie for her." Being further "required whether the said mariage was ever ratified bie carnall copulacion or other meane, answereth that, in his conscience, it was never."

One is glad to hear from another witness, who corroborated the one just quoted, that this "was the youngest mariage that he was at."

In the case of *Jane Sommer v. Roger Massy*, the Defendant swore, "that he was in the parish church of Deasbury, a good while sins, long before he came to any judgment or discretion, and whether he was then married to Jane Sommer or no, he knowes not, for he was borne in a man's armes:" that he never loved her, "nor yet knowes not what love meanes."

A witness in *Brigette Dutton v. George Spurstowne*, deposed, that the marriage of these parties took place in a private chapel belonging to the dwelling house of Rafe Dutton, Esquire: "the said Brigette being at the tyme of solemnization of the said marriage, under the age of fyve yeares and the same George beinge sixe yeares—at that tyme, the said Brigette coulde not perfectlie speake the wordes of matrimonie after the priest, because she was, at that tyme, in yeares tender and younge."

Margaret Osboston when married was about the age of vij or vij yerres—and was partlie borne in armes, and partlie led to some Church "to meet her spouse aged fiewly eleven: they were married by Sir Thomas French, then curate there."

Ann Ballard was a regular Eve. The evidence (given in November, 1565), was that James Ballard was married in the "parish Church at Colone upon the xij even in the Christmas shall be v yerres, come the Twelfth even next, about X of the clocke in the night, the saide James at that tyme beinge about xj or xij yerres of age, without the consent of his frendes, bie one Sir Roger Blakey then curate of Colne," to Ann, "she beyng a bigge damsell and marriageable the same tyme." The pity of it was—as James "declared unto his vncke, that the said Anne had intised hime with two apples to go with her to Colne and to marry her."

Apples appear to have been a great source of temptation to English boys in the sixteenth century. In 1538 Robert Parre, of Beckford, was at the age of three married to Elizabeth Rogerson; the record says, "he was hired for an apple bie his vncke to goe to the Church—wich helde hym in his armes the tyme that he was married to the said Elizabeth the att which tyme the saide Robert colde scarce speke."

One feels sorry for poor little Johnny Bridge and hopes that he got his separation from Elizabeth

Bridge nee Ramsbotham. The evidence was that "when the said John was but two years old, his grandfather and the father of the said Elizabeth Ramsbotham made a bargaine of mariage: and the monie was paid by the father of the said Elizabeth to bie a piece of land: and therefore the said John was married vnder age after the death of his grandfather, by the executours of his said grandfather, to the said Elizabeth to cave the monie."—"If he had not gone to the Church, and there have spoken the wordes after the priest, his father had beep undone." He was eleven or twelve, she some two years older. Even Elizabeth said that after their marriage he never treated her "lovinglie, in somoche that the first night they were married the said John wold eate no meate at supper, and when it was bed-tyme, the said John did wepe to go home with his father: yet nevertheless bie his father's intreating, and by the perswasion of the priest, the said John did come to bed to her, far in the night: and there lay still till in the morninge, in suche sort as this deponent (Elizabeth) might take unkindness with hym: for he lay with his backe towards her all night: and neither then, nor asie tynfe els, had carnall dole with her." Very sadly little Johnny said: "that he never touched her bare skin."

Only in one other of these Chester cases were there child spouses put to bed together: John Andrews and Ellen Dampart, aged respectively ten and eight, "on the first night they were married, they lay both in one bed, but ij of her sisters lay between him and her."

These Chester people were somewhat erratic as to the time of the marriage: one young couple were ushered into wedlock by the curate at the parish church, "in a morninge about cockes crowing with Torche light and candle-light:" "no bannes askid, but a license had." The lad "intised with two apples" was married at ten o'clock at night ("the curate was punished by his grace the Archbishop, of York for marieng at that inconvenient tyme.") The Walkers "were married together in a fiede—in the nyghte tyme, by moone lighte, by one Syr John Wood Clarke," "they were married accordinge to the books of Common Praier in all pointes and accordinge to the ceremonies of the Church of Englande." A runaway pair were married by a priest sitting up in bed upon his pillows about midnight.

Furnivall refers to many instances of child-marriages besides those that were brought before the Courts in that diocese. John Rigmarden, when aged three, was married to a bride of five; he was carried by a clergyman who coaxed him to repeat the words of matrimony, but before he was finished John said he would say no more that day: so the priest answered: "you must speak a little more, and then go play you." When Mary Darcy married Lord Eure at the age of four; "one

Marye, being nurse to the said Marye Darcy did first speake the wordes of matrimonye and the said Marye Darcy did repeat them after her."

In 1763 a boy under eight was married at Lambeth by the Archbishop of Canterbury to a girl about thirteen.

In Scotland child marriages were not unknown.

If child marriages were equally common in all parts of the kingdom, no wonder Philip Stubbes in his "Anatomic of Abuses in Aliqua" (England), says: "you shall have every sawey boy of x., xiiij., xvi., or xx yeres of age, to catch up a woman and marie her, without any feare of God at all or respect had either to her religion, wisdom, integritie of lyfe, or any other vertue . . . so he have his prettie pussie to huggle withal, that is the only thing he desireth."

The *Westminster Gazette*, a few years ago, announced that a little Indian boy and girl had just been tried at criminal Sessions at Berhampur on a charge of bigamy. The girl was aged six and the boy nine; they were indicted for marrying, the former being at the time to the knowledge of the bridegroom already (under the barbarous Indian custom of infant-child-betrothal) the wife of another. For three days little Lillith stood beside her fellow bigamist in the dock, while their respective parents were charged with abetting their offence. Ultimately the jury returned a verdict of "Not Guilty" and the youngsters went cheerily home again with the smallest possible conception of what all the bother was about.

veying, are being retained, I am sorry to say, without perhaps the knowledge of the Hon'ble Judges, where a sufficient number of pleader commissioners is available who have performed their work satisfactorily and are ever ready to take up commission business. The employment of men of such inferior qualifications and responsibility cannot be sanctioned either by law or the Hon'ble Judges. The introduction of men into this service, who are in many cases worse qualified than even the Salaried Amins, frustrates the very object for which the Civil Court Amins Act (II of 1899, B. C.) was passed.

If it is desired to secure greater efficiency amongst pleader commissioners this can be secured by supervision of the work entrusted to them, and by giving them more frequent employment. It is to be regretted that instead of this and contrary to the instructions of the Hon'ble High Court the claims of pleader commissioners are being ignored by the District Judges and such works are being done by inferior men. So far as my information goes this practice continues almost in every district much to the disadvantage of the pleaders. But regarding this the Hon'ble Judges may call for a statement and satisfy themselves as to the real state of things.

Complaints are said to have been made to the Hon'ble Judges both as regards the unsatisfactory manner in which commissions issued by Civil Courts have sometimes been executed by pleader commissioners and the excessive cost incurred.

As a remedy for this it may be mentioned that it may not be quite unwelcome to them to be appointed commissioners on a fixed salary. It may be worth while to consider whether it would not be better to create a graded service for them instead of giving them precarious employment as at present. The present system cannot satisfy them and give them a comfortable living from commission business. Professional work and commission work cannot also go on together. A certain number of pleader commissioners may thus be employed according to the need of each district in some of which there is real want and in some excess.

10th August, 1909.

JUSTICE.

### Correspondence.

[TO THE EDITOR OF THE "CALCUTTA WEEKLY NOTES."

SIR,—I must thank you for the comments that you have been pleased to make upon a letter that appeared under the signature of a pleader in Vol XII, page ccxxx of your journal. You drew very kindly the attention of the Hon'ble Judges to the said letter suggesting that some rules should be framed regarding the issue of commissions involving knowledge of surveying to qualified pleaders and fixing their scale of remuneration. You also endorsed the suggestion of your correspondent's note that "it would be doing them grievous injury if the Hon'ble High Court after calling them into existence should now leave them at the mercy of the Mofussil Courts." In the result a general letter No. 3, dated 19th April 1909, was issued to all the District Judges from the Hon'ble High Court, drawing their attention as to how these commissions were to be distributed and as to how they were to be remunerated.

Though following the resolution of the Hon'ble High Court, on the administration of justice, dated 1st August 1904, the Hon'ble Judges asked all the District Judges in the said letter to issue commissions "ordinarily" to qualified pleaders, then to Salaried Amins where they still exist, and then to outsiders if necessary; (vide paras. 2 and 3 of the said letter published in *Calcutta Gazette* of 4th August 1909), yet in practice the pleader commissioners, who are always ready to take up commission works, are sitting idle while Salaried Amins and outsiders are being provided with works. These outside Amins, many of whom are worse qualified than the Overseers, contemplated in para. 8 of the said letter and who have not passed any recognised examination in sur-

### Reviews.

'KELKE'S COMPANY LAW. Sweet and Maxwell, Ltd., London. 1909.

This is the second edition of this students' handbook of Company Law. In the present edition of 1909, the book, which is an intelligent summary of the statute and case law, has been adapted to the Act of 1908 and the recent cases. People who are desirous of getting a general idea of up-to-date English Company Law will find this book useful.

THE INDIAN CONTRACT ACT, with a commentary critical and explanatory. By Sir Frederick Pollock, assisted by Dinshah Fardniji Mulla, M.A., LL.B. Second Edition; London: Sweet & Maxwell, Ltd., 3, Chancery Lane; Bombay: Thacker & Co., Rampart Row; N. M. Tripathi & Co., Princess Street, Kalkadevi Road. 1909.

Our estimate of the first edition of this work (see 10 C. W. N. xii) appears to have been fully justified by the manner in which it was received

by the profession. As we then noticed, Sir Frederick Pollock's edition of the Act was very much more than an ordinary commentary. He subjected the provisions of the Act to a close and searching analysis in the light of legal principles, with the result that his critical and explanatory notes, though rather sparing, in references to decided cases, were of a highly instructive and illuminating character. The present is a much more improved edition, and more attention has evidently been paid in this edition to the needs of legal practitioners than was noticeable in its predecessor. The references to Indian cases, so far as we have been able to test, are fairly complete and Sir Frederick's able co-adjutor, Mr. Mulla, is to be congratulated for the care and discrimination shown by him in his selection of authorities from the reports of Indian cases. Mr. Mulla has not in this edition limited his selection to cases reported only in the Indian Law Reports Series. The English Sale of Goods Act of 1893 and the Partnership Act of 1890 are printed *in extenso* in the appendix for purposes of comparison. A more detailed examination of a work of such recognised merit seems hardly called for. We need only repeat what we said in noticing the first edition, that the work should set the standard for writing commentaries on the Indian Codes.

THE INTERPRETATION OF DEEDS, WILLS AND STATUTES IN BRITISH INDIA. By K. Shekry Bonnerjee, M.A., (Oxon), Barrister-at-Law and Advocate of the High Court of Calcutta. Calcutta: Thacker, Spink & Co. London: W. Thacker & Co., 1909.

This little book of 222 pages purports to embody the Tagore Law Lectures of 1901. To deal with a subject (or rather three subjects) of such magnitude with anything approaching completeness within its compass would on the face of it be an impossible task. The author himself says in the preface that he has endeavoured to present in a concise form the principles governing the construction of deeds, wills and statutes. This description indicates the scope of the work even more truly than the title, for this work is no more than a synopsis—a very well arranged and lucidly expressed synopsis—of those principles as known to English lawyers, with instances here and there of their application to Indian cases. We miss entirely all references to the rules peculiar to Indian Law or rather to the departures from the rules accepted in English Law Courts, to which Courts in this country have been led by a consideration of the very different circumstances under which deeds and wills and even statutes have to be framed in this country. It is true that in the majority of cases the same rules of construction must in the result apply.

But if there is one rule of law which has been firmly established in our Courts, it is this that no artificial rules of English Law—and rules of construction are more or less artificial—should be accepted by the Indian Courts merely because they have been firmly established in England. No rule of construction can indeed be accepted here unless it satisfies the requirements of "Justice, equity and good conscience" as enunciated in some of the earliest cases decided by the Privy Council and now embodied in our Statute law. In this respect the book leaves much to be desired. The introductory chapter in which the author has endeavoured to set forth the general principles of interpretation shows both insight and originality. These principles apply equally in India and England, and students and practitioners alike will find this chapter instructive.

ELEMENTS OF HINDU LAW. By H. L. Chakravarti, M.A., B.L., Vakil, High Court. S. K. Lahiri & Co., 54, College Street, Calcutta. 1909.

This is an ably written summary of Hindu Law intended for students. Read with one of the larger treatises it may prove useful in focussing the attention of the reader to the main conclusions deducible from the texts, commentaries and cases. To that end the author further appends a set of questions with suggestions as to their answers. Occasional references to leading cases and some quotations from texts and judgments collected at the end of the summary, give this little book a flavour of scholarship in which this class of books is generally wanting.

## Notes of Cases.

### CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL APPELLATE JURISDICTION: Before JENKINS, C. J., and CASPERSZ, J. CRIMINAL APPEAL No. 39 of 1909. GANJAR KHAN AND ORS., Appellants v. THE KING-EMPEROR. 26th July 1909.

Rioting—Common object—Defect in charging common object—Charge, how to frame.

The three Appellants were convicted by the Sessions Judge of Faridpur, under sec. 304 read with sec. 149, I. P. C., and sentenced to 4 years' rigorous imprisonment each. They were also convicted under sec. 147, I. P. C., but no separate sentence was passed. The case arose out of an occurrence which resulted in the death of one Basir and the present case was supplementary to one in which

one Sommeruddi was convicted and sentenced to six years' rigorous imprisonment under sec. 304, I. P. C., which sentence was affirmed by the High Court. It appears that the complainant got a decree against one Jainuddi by which the complainant was declared to get possession of a plot of land in Agrahan from Jainuddi and if he did not then deliver possession, the complainant would get possession by the process of the Court. In the month of October the Appellants erected some huts on the plot and the complainant's party opposing, a riot ensued in the course of which Basir was speared by one of the Appellants' party with the result that he died shortly afterwards. The Sessions Judge found that the Appellants had no title to the lands and that the Appellants in concert with Jainuddi wanted to deprive the complainant of the land for which he had got a decree against Jainuddi. The common object charged was to take forcible possession of the complainant's land or to assert a right or supposed right to the land.

*Babu Brajendra Nath Chatterjee* for the accused contended *inter alia* that as the complainant was not in possession at the time of the occurrence, he had no right to enter upon the land and oppose the erection of the huts; that it could not be said the common object was to take forcible possession of the complainant's land, because the complainant was not then in possession but Jainuddi who was in possession did not object. Suppose Jainuddi himself erected the huts, could the complainant's party have entered upon the land and opposed the erection? Even complainant's title to the land was not proved because the decree on which it was based was not admissible in evidence against the accused.

*Mr. Orr, The Deputy Legal Remembrancer*, for the Crown contended that the accused in concert with Jainuddi wanted to deprive the complainant of the decreed land, the erection of the huts with the help of a large body of men armed with dangerous weapons was taking forcible possession of the land. At any rate the accused's object was to assert a right or supposed right to the land by means of force or show of force. Their object was not *bona fide*. At any rate, if the charge was considered defective there should be a retrial.

Their Lordships observed:—

"Under the decree which has been admitted in evidence Jainuddi was entitled to retain possession until the following month of Agrahan, and under the decree the complainant was only entitled to take possession by recourse to the process of the Court. It therefore cannot be said that at the time of taking possession the common object was of taking forcible possession of the land or, as the charge has been amended, of asserting a right or supposed right thereto. There was no opposition on the part of the person entitled to possession.

"It is impossible for us at this stage to evolve a fresh common object, nor do we think on the finding of the Sessions Judge that the justice of the case requires that we should send back the case. &c., &c. . . . in drawing up charges more regard should be paid to the terms of the section or sections under which the charge is being framed."

*Conviction and sentence set aside and the accused released.*

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and VINCENT, JJ. CIVIL RULE NO. 2681 OF 1909. SAIBESH CHANDRA SARKAR, Plaintiffs, Petitioners v. KUMAR BONWARI MOKUND DEB BAHADUR, Defendant, Opposite Party. 26th August 1909.

*Putni—Death of putnidar—Duty of heirs to register their names in the landlord's sheristha—Landlord not bound to accept rent from unregistered tenant.*

Plaintiffs brought a suit in the Small Cause Court, Bolpore, for recovery of the *putni* rent paid by them under coercion on the allegation, that they have a *putni* mehal under the Defendant, but that their mother's name was registered in the landlord's *sheristha*, that in June 1902 their mother made gift of the property in their favour but they continued to pay rent in their mother's name even after her death which took place in April 1905, but in 1907 the Defendant refused to accept rent from them and demanded an exorbitant *selami*, that the Plaintiffs sent rent for several *lists* by postal money-order which was refused, they then deposited the money in Court under sec. 61, Bengal Tenancy Act, and notice was served on the zemindar-Defendant but in spite of that the Defendant took proceeding under Regulation VIII of 1819 and wanted to have the *putni* sold, that the Plaintiffs were obliged to pay the amount to the Defendant's agent to stop the sale and they now brought the suit for recovery of the said amount. The defence was that Matangini Dasi, Plaintiffs' mother, was the recorded tenant and no steps were taken by the Plaintiffs to get their names recorded either by virtue of the deed of gift alleged to have been executed by Matangini or after her death as her successor and that after their mother's death Plaintiffs wanted to pay the rent in their own name without taking any steps under secs. 5 and 6 of the *Putni Regulation* or sec. 15, Bengal Tenancy Act, and the alleged postal money-order or deposit was made by Plaintiffs in their own names and Defendant was not bound to accept the Plaintiffs as his tenants or to receive the deposits. The Small Cause Court Judge held that the Plaintiffs had no cause of action and dismissed the suit. Plaintiffs then moved this Court and obtained the present rule.

It was argued on their behalf that the Plaintiffs were not bound by any law to get their names registered, there being no provision in the Putni Regulation to that effect and that the Plaintiffs having deposited the rent to the knowledge of the landlord the proceeding taken under the Putni Regulation for the sale was illegal, 24 W. R. 63, 7 W. R. 218, and therefore they were entitled to get back the money and sec. 15 of the Bengal Tenancy Act did not apply to *putni* tenures. For the Respondent it was contended that the landlord was not bound to recognize any body except the registered tenant and the Plaintiffs were bound after the alleged gift to get their names registered, 14 W. R. 489, I. L. R. 14 Cal. 162, 20 W. R. 380, and that if the Plaintiffs claimed by virtue of their title by succession after their mother's

death they were bound under sec. 15, Bengal Tenancy Act, to get their names registered, as this section applies to *putni* tenures, I. L. R. 19 Cal. 504, that the deposit in this case was not by the registered tenant as in 24 W. R. 63.

*Held*—The Plaintiffs were bound to get their names registered after the alleged gift from their mother and the landlord was not bound to accept any rent from them and they had no cause of action. 14 W. R. 489, 20 W. R. 380, I. L. R. 14 Cal. 162 (166), followed; 24 W. R. 63, distinguished.

*Babu Hemendra Nath Sen* for the Petitioners.

*Babu Kshetra Mohun Sen* for the Opposite Party.

A. T. M.

*Rule discharged with costs.*

# Calcutta Weekly Notes.

Vol. XII.]

MONDAY, SEPTEMBER 20, 1909.

[No. 45]

## Contents.

### NOTES.

#### EDITORIAL NOTES—

ARTICLE—  
Injunctions against the Enforcement of Judgments obtained by Perjury

#### REVIEWS

#### REPORTS (See Index.)

WE DEEPLY REGRET TO HAVE TO RECORD THE death of Mr. Lalmohan Ghose which lamentable event took place on last Saturday evening.

WE INVITE ATTENTION TO THE REPORT OF THE Full Bench decision in *Pirithi Chand Lal Chowdry v. Sheikh Basarat Ali*, at p. 1149 of this number. The whole of the difficulty raised by the case of *The Secretary of State v. Kajimuddi*, I. L. R. 26 Cal. 617, as to the interpretation of sec. 115 of the Bengal Tenancy Act, has not been set at rest by the decision of the Full Bench. It has laid down, not without some hesitation, that a tenant can rely on the presumption of fixity of rent arising under sec. 60 of the Bengal Tenancy Act from proof of uniform payment of rent for 20 years, in a proceeding for settlement of fair and equitable rent under sec. 105 of the Bengal Tenancy Act and that sec. 115 does not apply in such proceeding. The question in the case in 26 Cal. was whether in a suit instituted in a Civil Court to contest the correctness of an entry in the record-of-rights, the presumption under sec. 59 of the Bengal Tenancy Act is negatived by the operation of sec. 115. The main reasoning adopted in that case, *vis.*, that sec. 115 was intended to lay down only that the presumption of fixity of rent will not arise upon proof of payment of the same rent during a period of 20 years following the preparation of a record-of-rights has no doubt been overruled. But as both the cases referred to the Full Bench arose out of proceedings under sec. 105, the question whether sec. 115 applies to suits of the nature referred to in sec. 111 or 111A did not arise and has been left open. The question which has been actually decided was, however, of sufficient importance to call for the very full discussion which took place at the hearing and which we set out at some length.

IT WILL BE REMEMBERED THAT WE RECENTLY noticed a question in Parliament and Mr. Gladstone, the Home Secretary's answer regarding imprisonment for fines (see *ante*, p. 277, notes). We now

understand that a "Fines Bill" has been presented by Mr. Luttrell which has been printed and circulated. The full title of the Bill is "a Bill to amend the Law in regard to the Payment of Fines, Damages and Costs, and Imprisonment in Default of Payment thereof, and for other Purposes, connected therewith." The first provision attached to the memorandum of the Bill is remarkable as proceeding almost on the same lines that suggested to ourselves while we commented on the question. Amongst its leading provisions the first goes on to provide:—

That no person having a settled place of abode; and not likely to abscond, shall be committed to prison in default of payment of a fine, costs, or damages until the expiration of a period (not less than a week) to be prescribed by the Secretary of State.

*The English Law Journal* HAS AN INTERESTING paragraph in its last issue about Saturday Sittings and the Long Vacation. Some of the Judges prefer to sit half an hour longer every day for making good the two hours and a half of Saturday sittings and observe Saturday as an off day. *The Law Journal*, however, suggests that it would be preferable to curtail the Long Vacation and to observe Saturday as *dies non*. Professional opinion amongst us is not also in favour of Saturday sittings. But so long as the Judges cannot get abreast of their work the Saturday sittings may be continued and professional objections to it must occupy a secondary place to the great public advantage of not allowing judicial work to accumulate and drag on. As regards the Long Vacation, however, we believe that the majority of professional men are agreed that the closing of the High Court seven weeks before the Dusshera (Durga Pujah) causes a considerable loss of public time during a very busy part of the year and makes the vacation of little use except to a fortunate few. If the High Court is closed even for two months a fortnight before the *Pujah*, it will enable the Judges to show considerable progress with their work and all classes of people connected with the High Court will get equal advantage of the annual vacation. It is said that the present Lord Chancellor has in contemplation the curtailment of the Long Vacation in England and we may expect that the Long Vacation of the Calcutta High Court will also some day be rationalized.

THE PASSION FOR MAKING MONEY IS SAID TO BE

stronger in an American citizen than in any other type of modern man. But it seems that eminent members of the legal profession in America are as ready to sacrifice a money-making career in the service of their country as any other distinguished citizens of that great Commonwealth. Now that we in this part of the world are getting at least as much materialized as any western people, we would do well to cultivate amongst ourselves the spirit of sacrifice for public weal that is ever present in the minds of our occidental brethren. We publish below from the *Canadian Law Times* an account of the enormous sacrifices made in recent times by the leaders of the American Bar at the call of duty towards the Commonwealth.

The American newspapers point out several instances in which the opportunity of entering the Cabinet at Washington and of being engaged in important public services had induced eminent lawyers to sacrifice a large professional income and the prospect of amassing a handsome fortune. Mr. Elihu Root, at the time when he entered the Cabinet of President McKinley, as Secretary of War, had a heavy and lucrative practice, and had just been offered by the National Traction Company of New York a yearly retainer of 100,000 dollars for no other service than that of being at hand whenever the company should call upon him for his opinion or professional assistance. He accepted the office under the President, the salary of which was only eight thousand dollars, and has since been actively engaged as Secretary of War and Secretary of State. A more recent instance is that of Mr. G. W. Wickersham, the present Attorney-General, whose professional income, when he took office, was one of the largest ever earned by any lawyer in New York, and whose yearly salary is now less than some of the single fees which he received for opinions or professional advice. It would not be easy to match these instances by examples taken from the chronicles of English and Canadian lawyers, but the retirement of Mr. Asquith, Mr. Haldane, and Mr. Aylesworth from their successful careers at the Bar in order that they might form part of the present ministries shews that the opportunity of being placed at the head of one of the principal departments of the State will lead to the same sacrifices as in the United States.

WE RECENTLY REVIEWED IN THESE COLUMNS THE new Turkish constitution. Our readers may naturally feel a curiosity to know the character of the laws and the judicial system that prevail in Turkey. Those to whom the *Law Quarterly Review* of the present year is available will find an article in its January number by Mr. Anton Bertram, a Praiseworthy Judge of Cyprus, very interesting reading. The object of the article is to present to the reader a brief review of the Turkish laws and jurisprudence from the point of view of European ideas of law and justice and more specially that of England. "The first impression of the observer," says the writer, "is the extraordinary newness and modernity of the whole field." It is, perhaps, still more surprising to us when we find that the "whole legal and administrative life of Turkey has been forced into new moulds" not since the recent revolution but since the middle of the nineteenth century when the era of reform in Turkey was inaugurated. It is

said that this spirit of reform was greatly helped by the great English ambassador, Lord Stratford de Redcliffe in 1856, but there can be no question that the French influence has swayed the enlightened and intellectual minds in Turkey even from the earlier part of the nineteenth century in bringing about the new regime in Turkey.

IT IS, PERHAPS, NOT KNOWN TO MANY OF US that during the last half century the whole civil law, except the purely religious portions and those dealing with *statut personnel*, has been codified in Turkey. The whole system of justice has been reorganized. The Courts have been secularized and the old religious tribunals retain only a very restricted competence. The judicial procedure is regulated by a series of complete modern Codes and it is quite compromising to the Government of India to be told that "the executive power has been severed from the judicial" in Turkey not quite recently but some time ago. The era of reform in Turkey corresponds with the assumption of the Government of India by the Crown of England and this much-needed reform is being put off in India indefinitely although it has long since become an accomplished fact in Turkey.

THE PENAL CODE OF TURKEY DATES FROM 1856. By this Code an integral portion of the Sher' law based on the utterances of the Prophet as recorded in the Quran was in effect abrogated and an entirely new criminal law, which is in its main features simply a translation of the French Penal Code, was promulgated in its place. This Code was based on the French Code of 1810 and the 484 articles of the latter have been abridged into 254 articles after some omissions and modifications to suit the requirements of Turkey. For instance, bigamy is excluded from amongst offences and the age of moral responsibility has been fixed at puberty according to the ideas of Moslem law. There are also some striking omissions in this Code which, having regard to recent events in Turkey, would seem to have been done with a purpose by Turkish legislators. The writer of the article says:—

If there was any chapter of the French Code which one would have imagined that the Turkish legislator would have retained with emphasis it is that concerned with attacks and plots against the head of the State (Articles 86-90). Strange to say, this part of the French Code disappears altogether. It excites less surprise to find that the Section headed 'attaques à la liberté' is also wanting.

IT IS NO LESS REMARKABLE THAT IN THE TURKISH Code not only the elaborate gradations of punishment of the French Code have been simplified but also the scale of punishment has been modified on more humanitarian lines as the following extract from the article will show:—

But the most surprising feature of the Code is the manner



In which the French scale of punishments has been dealt with. From the severity of the Sher' law, one would have anticipated an intensification of the French scale. What has actually taken place is that the punishments have been cut down. A sentence of simple imprisonment in French law is from six days to five years, in Turkish law is from one day to three years; the ordinary sentence of hard labour in French law (*travaux forcés à temps*) is from five to twenty years, in Turkish law from three to fifteen years. Attempted *meurtre* with premeditation in French law is punishable with death, in Turkish law with fifteen years' hard labour. Wounding causing loss of a limb or eye, without premeditation, in French law receives five to ten years' 'reclusion,' in Turkish law three years' hard labour; if with premeditation, in French law hard labour for life, in Turkish law hard labour for ten years. Finally, *meurtre* without premeditation is punished in French law with hard labour for life, in Turkish law only with hard labour for fifteen years.

### INJUNCTIONS AGAINST THE ENFORCEMENT OF JUDGMENTS OBTAINED BY PERJURY.

Although at first jealously resisted, *Booth v. Ryley* (Cro. Jac. 335), the power of equity courts to enjoin the enforcement of judgments at law has, since the famous clash between Lord Coke and Lord Ellesmere (see Campbell, *Lives of the Lord Chancellors*, 3 ed., 332), been firmly established. It is a rule of law that judgments are conclusive between the parties in matters that were or might have been urged. *Glover v. Hedges* (1 N. J. Eq. 112); *Demerit v. Lyford* (27 N. H. 541). But this rule does not apply where the facts clearly show, either that the defeated party was unable to present his defence in the determination because the Court was incompetent to hear it, or that without fault on his part he was prevented from presenting it through accident or fraud. *Marine Insurance Co. v. Hodgson* (7 Cranch (U. S.) 332); *Vilas v. Jones* (1 N. Y. 274). Accordingly, if a defence, owing to its equitable nature could not have been pleaded, *Hibbard v. Eastman* (47 N. H. 507), or if because of sickness, *Owen v. Gerson* (119 Ala. 217) of ignorance *Adams v. Secon* (6 Kan. 542). [Failure to set up a defence through accident or mistake is ground for relief, especially when coupled with concealment by the opposing party], *Carrier v. Esty* (110 Mass. 536), *Herbert v. Herbert* (49 N. J. Eq. 70), the defeated party could not appear, equity will enjoin the enforcement of the judgment. As to what constitutes such fraud as to justify equitable interference the authorities are in conflict. The great majority, however, require that the fraud shall be extrinsic and collateral, and not relative to an issue tried in the Court of law. *Baker v. Wadsworth* (67 L. J. Q. B. n. s. 301); *Graves v. Graves* (132 Ia. 199); *United States v. Throckmorton* (98 U. S. 61). Contra *Marshall v. Holmes* (141 U. S. 589). The last two cases seem to constitute an irreconcilable conflict in the Supreme Court. See *Graves v. Faurot* (64 Fed. 241). So perjury, however clearly established, *Pico v. Cohn* (91 Cal. 129), is generally considered no ground for equitable relief, since it is related to

matters involved in the consideration of the merits, and therefore intrinsic. *Maryland Steel Co. v. Marney* (91 Md. 360). A recent decision upholds the minority view that perjury will vitiate a judgment obtained against one free from negligence in the determination. Similarly fraud in the original cause of action, such as forgery, which must be regarded as extrinsic fraud, has been held to vitiate the judgment. *Barnesley v. Power* (1 Ves. Sr. 119). *Boring v. Ott* [119 N. W. 865 (Wis.)].

The reason that equity relieves against judgments secured through accident or fraud is to prevent the retention of an advantage unfairly or unconscionably gained. *Jewett v. Dringer* (31 N. J. Eq. 586); *Perry v. Johnston* (95 Fed. 322). Assuming that the injured party was not guilty of laches, the same reason applies to intrinsic as well as extrinsic fraud, and hence to perjury. See *Greene v. Greene* (68 Mass. 371); Given's Appeal, 121 Pa. St. 260. Two main objections urged against equitable interference because of perjury are, first, that, as the case was once, the less tried on its merits despite the perjury, *Priese v. Hummel* (26 Ore. 145), to permit a re-examination would result in flooding the courts with litigation; *United States v. Throckmorton*, supra; second, if judgments may be impeached on the ground of perjury, each defeated party may in turn charge the other with perjury in the last suit, so that litigation would never terminate. *Greene v. Greene*, supra; *Flower v. Lloyd* (10 Ch. D. 327). To sustain the first objection we are driven to say that one against whom a judgment has been gained by fraud in some collateral matter, such as a false promise of compromise, has not had his day in Court; but that one who without fault on his part was ignorant of, or unable to establish a fraud which later clearly appeared, has had a fair trial on the merits. Yet in both cases it is inequitable for the victor to retain his advantage. *Barnesley v. Power*, supra. The second objection is more serious. It is to be noted, however, that before relief is granted on the ground of perjury it is required that the Plaintiff have a meritorious defence and that he clearly establish the perjury. *Briesch v. McCauley*, (7 Gill (Md.) 29). In North Carolina conviction of perjury is required. *Peagram v. King* (9 N. C. 295). Consequences are not always conclusive against a rule of positive law; *Greene v. Greene*, supra, and here the equity of the case is clear.

It is said that the refusal to enjoin the enforcement of judgments on the ground of perjury is a necessary choice between the evils of injustice in individual cases and the encouragement of vexatious litigation. *United States v. Throckmorton*, supra. But a party seeking redress is required to exhaust first his legal remedies, *Mo. Ry. Co. v. Hoereth* (144 Mo. 136); *Ponder v. Com* (28 Ga. 485), to be free from fault, *Carniey v. Marseilles* (136 Ill. 401); *Jewett v. Dringer*, supra, and clearly to establish the perjury, *Glover v. Hedges* (1 N. J.

Eq. 113), without which judgment would not have gone against him. *Bloss v. Hull*, (27 W. Va. 503). It is submitted that with these safeguards against undue litigation the lesser evil is to follow the equity of the matter.—*Harvard Law Review*.

### Reviews.

THE LAW OF TRANSFER IN BRITISH INDIA. By H. S. Gour, D. C. L., L. L. D. Third edition, Vol. II. Calcutta, Thacker Spink & Co. Price Rs. 10. 1909.

The present volume, though in appearance a commentary on Chap. IV of the Transfer of Property Act, is really an exhaustive treatment of the law, both substantive and adjective, relating to mortgages and charges. The reenactment of the procedure portion of Chap. IV of the Transfer of Property Act in Order 34 of the New Code of Civil Procedure has given Dr. Gour an opportunity of recasting the arrangement of this volume by separating the portion dealing with procedure from that dealing with the substantive law. Dr. Gour's method of annotation has by this time become well known and we need not enlarge upon it in noticing the third edition of this work. Suffice it to say that he does not take up any subject without literally exhausting it. Every single provision of law is treated with reference to principle, history and case-law. The notes are learned and generally ponderously so. But whilst this very characteristic makes the book unsuited for study, whether for purposes of pleasure or learning, it makes it on the other hand an ideal book of reference. It is needless to add that the references in this volume are up-to-date.

CLERK AND LINDSELL ON TORTS. Fifth Edition. By Wyatt Paine. Sweet and Maxwell, Ltd., London. 1909.

The present edition of this well-known work on Torts is stated to have been produced as a companion volume to the latest edition (the 15th) of Chitty on Contracts, so that the combined treatises may form a compendious statement of the various legal obligations arising *ex delicto* and *ex contractu*. But apart from this there have been changes of an important character in the law itself within the last 15 years calling for a re-consideration and re-statement of the law on many points. The changes have been due to a great extent, but not entirely, to legislative enactments. Since the last edition of this work appeared in 1906, the Trades Disputes Act of 1906, The Patents Designs Act of 1907, the Fatal Accidents (Damages) Act of 1908, the Law of Distress Amendment Act of 1908, and isolated provisions of other enactments have made serious inroads into the accepted notions of the

liability of individuals and bodies in respect of certain classes of acts and omissions. The present edition of the work which justly lays claim to be a complete survey of the law of torts has had to take these changes into account. Recent decisions, notably that of *Quinn v. Leatham*, (1901) A. C. 494, have actually widened the entire outlook of Judges and the public alike as to the scope and extent of the rights and obligations upon which the law of torts is founded. The discussion, which took place at the hearing of that case, though rather inconclusive in the way of establishing a precedent, has continued to act and re-act on existing ideas of fairness and justice upon almost every branch of the law of torts. This result is found reflected in the changes introduced in the present edition of this treatise. The editor is careful to observe that notwithstanding important alterations, the original features of the work which had earned for the earlier editions a place amongst standard legal treatises, have been preserved. But this, we are glad to notice, has not stood in the way of the Introductory chapter being altogether recast—a change rendered necessary by the light thrown on the nature of the law of torts by the labours of historical and analytical jurists. The new "Introductory" is from the pen of Mr. J. F. Clerk, one of the authors of the original treatise. We need not go into the details of the work. It is not too much to say of this work that it is a solid and substantial treatise embodying almost the last words to be said on the subject of torts as also all matters which can legitimately come within the subject-matter of the treatise, including matters of procedure and the assessment of damages. It would indeed be invidious to select any particular portions of the treatise for special mention. But we refer only to the chapters dealing with Notice of Action, Defamation, Malicious Words and Slander of Title, Malicious Prosecution and Officers of Justice as being those to which no Indian lawyer at this moment can turn without profit.

THE LAW OF SANCTION TO PROSECUTE. By Sripati Roy, Barrister-at-Law. Second Edition. Hare Prefs, Calcutta. 1909.

This handy collection of references on a subject of some importance has, we find, proved useful to the profession. A lucid introduction and a methodical arrangement of the contents under various convenient heads furnish the necessary key to this compilation. A schedule of enactments bearing on the subject and a carefully prepared subject index enhance the value of the work as a book of ready reference. The book covers some 300 odd pages, is up-to-date and handy in size and get-up.

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well acquainted with the Liberal leaders and many English constituencies. In 1885 he was invited by the Greenwich constituencies and decided to contest Deptford in the Liberal interest. It was an impossible constituency for a Liberal candidate as even Mr. Gladstone did not consider it safe for himself to contest Greenwich. But Mr. Ghose made a brave fight and it was only because of Mr. Parnell's mandate to the Irish voters not to vote on the Liberal side that Mr. Ghose lost his seat in Parliament.

On the reconstitution of the Provincial Legislative Councils in India in 1892, he was elected a member of the Bengal Legislative Council by the Municipalities of the Presidency Division. His services in connection with the Mofussil Municipal Bill and as a councillor generally met with appreciation both from the public and the Government. In 1903 he was elected President of the Indian National Congress.

Mr. Ghose's love of literature was, perhaps, keener than his love of public life. He used to devote a good deal of his time to the study of literature and history. He rendered into English verse a portion of the powerful and charming epic, *Meghnad Badh* by Bengal's premier poet *Madhusudan Dutt*, who was also a distinguished member of the Calcutta Bar. He was for sometime studying the history of the Neapolitan period from French sources with a view to present the result of his research to the public. But unfortunately he was stricken with paralysis in the midst of his labours and was practically an invalid for the last three years of his life. We mourn his loss all the more because the gaps that are being created by the inexorable decree of time are not being filled and the chances of others taking the place of the illustrious deceased seem remote indeed.

### Reviews.

THE LAW RELATING TO EASEMENTS IN BRITISH INDIA. By *Federick Peacock, Barrister-at-Law and Advocate of the High Court at Calcutta. Second Edition. Calcutta and Simla: Thacker, Spink & Co., Bombay: Thacker & Co., Ltd. 1909. Price Rs. 18.*

This work originated in the Tagore Law Lectures for 1899 by the author, and was first published in 1904. That a second edition should be so soon called for is a sufficient proof that this work, unlike many of the Tagore Lectures, has been well received by the profession. After a close examination of its contents, we are also satisfied that the book will bear comparison with some of the best English and Indian text-books on legal subjects. It deals with the subject of easements and the closely connected ones of natural rights to light, air, water and support, and licenses, in all their bearings, and with special reference to Indian cases and statutes, though naturally in dealing with such a subject English

cases come in for treatment much more frequently than Indian cases. The author's treatment of the subject shows a thorough grasp of principles and a no less complete mastery of details. The arrangement of the subject-matter leaves little to be desired and we have no hesitation in saying that the book will occupy a front rank amongst Indian legal publications, and is one on which students as well as legal practitioners may rely with equal confidence. We notice that to meet the requirements of practitioners in the mofussil, the author has made lengthy extracts from English law reports and very properly. A subject like Easement cannot be properly dealt with without largely drawing from the exposition of the law by eminent English Judges. In conclusion, we may mention that in the appendix are given the English and Indian statutory provisions bearing on the subject, with the exception of the relevant sections of the Limitation Act of 1908—an omission which is remarkable in a work executed with such studious care.

THE INDIAN LIMITATION ACT, 1900. Act No. IX of 1908, with the case-law thereon. By *T. V. Sanjiva Row, First Grade Pleader, Trichinopoly, Madras. Printed at the Law Printing House, Mount Road. 1909.*

Mr. Sanjiva Row's style of annotating the Codes is familiar to the profession. The present work is really a new edition of the annotation of the Act of 1877 which appeared in the Lawyer's Companion Series. Mr. Sanjiva Row's collection of cases is exhaustive, perhaps more so than is required for a proper exposition of the meaning of the provisions of the enactment. But we need hardly say that the work does not lay claim to be a commentary. It is indeed nothing more than a collection of authorities arranged and classified in a fairly intelligible order. The book is not however a mere collection of cases. The references to text-books will assist the reader in his search for principles. The book with the index of cases and the subject index covers about a thousand pages, and is dedicated to Mr. Justice Asutosh Mukherjee.

THE INDIAN LIMITATION ACT. Being Act IX of 1908, with Notes &c. By *Mohendra Kumar Sen, B. L. Second Edition, Calcutta. Printed and Published by B. Basal at the Law Publishing Press, Nos. 3 to 5, Bow Street. 1909.*

This is a handy annotation of the new Limitation Act. The Notes are short and select and will prove useful for ordinary purposes of practice. They are arranged under separate heads and in a manner calculated to facilitate the search of references. The book covers about a hundred and seventy-five pages including the index.

THE PROVINCIAL SMALL CAUSE COURTS ACT. No IX of 1887 (with Notes). By *K. S. Lakshmi*.

*Narasa Aiyar, B.A., B.L., District Munsif, Rani-put, North Madras. Printed at the Ananda Press. 1909. Price Rs. 1-8-0.*

This is a handy case-noted edition of the Provincial Small Cause Courts Act, which should prove useful to those who practise in such Courts. The notes are well arranged and reliable.

### Notes of Cases, ENGLISH LAW COURTS.

**COURT OF APPEAL.**—*Brice v. E. Lloyd, Ltd.* Before THE MASTER OF THE ROLLS, LORDS JUSTICES FARWELL AND KENNEDY. 22nd July 1909.

#### *Accident arising out of employment.*

This was the employer's appeal. The workman, Brice, was engaged to clean cylinders. On the night in question he along with others went to the pump-room on account of its warmth and had their suppers on the top of the tank although a dining room was provided for them. It was proved that it would have been the foreman's duty to report to the chief Engineer the name of any working man who had climbed on to the tank and who would have been dismissed for so doing. Brice fell into the tank and sustained injuries which resulted in his death. The Court below made an award in the applicant's favour relying on *Blovelt v. Sawyer* (1 K. B. 271, 1904).

The Court allowed the appeal. In the course of his judgment the Master of the Rolls observed as follows:—

In the present case there was no dispute about the facts and the only question was as to the inference to be drawn from those facts, and in his Lordship's opinion the accident arose in the course of, but not out of, the employment. It had been decided that a man might obtain compensation for an accident that took place at a time when he was not actually at work. The case of "*Blovelt v. Sawyer*" (1904, 1 K. B. 271) was a good illustration of that proposition, but in his Lordship's opinion it did not justify the wide proposition of law that the learned County Court Judge thought that it had decided. In that case the workman was a brick-layer employed on the works of the Respondents at so much an hour, but the men were privileged, with the knowledge of their employers, to do what was almost inevitably done in such cases, they might get their meals either on the employer's premises or elsewhere. It was in fact an implied term of the contract of their employment that they might get their meals on the employer's premises and what had been called in several of these cases the nexus between the employers and the workmen was not thereby dissolved. At the time when that case was decided the accident had to arise on, in, or about the premises as well as out of and in the course of the employment. It did arise on the premises, and the only question

was whether it arose out of, and in the course of the employment. The Court then decided that the man was entitled to compensation and his Lordship would read a passage from his own judgment which would indicate the view that he took:—"In my view it can make no difference if by the terms of the particular engagement the workman was to have the right, if so minded, to get his dinner on the employer's premises."

It would be entirely to misunderstand that decision if it were to be held that a workman had liberty to get meals on any portion of the employer's premises. However dangerous or unsafe it might be. There was nothing in the case in any way to justify such a contention. Precisely the same remark applied to the case of "*Morris v. Mayor of Lambeth*" (22 *The Times* L. R., 22). In that case the accident happened, not within the shelter provided for the workmen, but within a shanty within which it was usual for the workmen to sit and take their food. In that case it was held that the shanty, being a usual and accustomed place for them to sit in, it was irrelevant to say that there was another shelter. So in the present case his Lordship thought that no importance ought to be attached to the circumstance that a dining-room was provided by the employers if the men were not bound to get their meals there. But it was a very much longer step to hold that if they were not bound to get their meals in the dining-room they were at liberty to get their meals, as it was put in the course of the argument, in hot weather on the top of the roof, and to climb up there by a ladder, or in colder weather on the top of the hot water tank, getting there by means which imposed risk on the persons who ventured on such an excursion.

The Lords Justices took the same view.

*Mr. Frampton* for the Appellant.

*Mr. Gibson* for the Respondent.

*Appeal allowed.*

### CALCUTTA HIGH COURT.

#### Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

**FULL BENCH REFERENCE.** Before JENKINS, C. J., STEPHEN, J., MOOKERJEE, J., COX, J., and CHATTERJEE, J. APPEAL FROM ORIGINAL DECREE No. 25 of 1906. BHUPATI NATH BHATTACHARYA AND ANOTHER v. RAM LAL MOITRO AND OTHERS. 28th August 1909.

*Hindu Law—Will—Direction to executors to establish Thakur and spend surplus income in its shoba—Validity.*

The testator, Umesh Chandra Lahiri, died on the 28th June 1890, after having made a Will on the 26th June 1890. Amongst other matters the Will

provided, "all my properties shall be placed in the hands of . . . as trustees." They were to give certain annuities, to defray the expenses of certain named relatives and to pay Rs. 10 per annum to his Guru and Rs. 5 to his Purohit. It also directed that the trustees "shall spend the surplus income which may be left, in the *sheba* and worship of Kali after establishing the image of the Kali after the name of my mother, i.e., in the name of Iswar Ananda Moyi Kali. I further provide that if for any reason, the image of Iswar Kali Dabee is not established and if the income of my properties is not used for her *sheba* and worship, then my Gurudeb and his sons and grandsons in succession shall get my Rangpur properties and possess the same in absolute right from generation to generation with right to sell etc."

In October or November 1894 the executors established and consecrated the image of the Goddess.

The present suit was instituted by the sons of the Guru of the testator for the construction of the Will, for a declaration that the direction for the establishment and consecration of the image of the Goddess Kali and her worship was void, for possession of the Rangpur properties and for accounts and mesne profits. The Court of first instance held that the bequest in favour of the Goddess was valid. On appeal, the Divisional Bench before whom it came up for hearing referred the following questions for decision to a Full Bench.

(1) Does the principle of Hindu Law which invalidates a gift other than to a sentient being capable of accepting it, apply to a bequest to trustees for the establishment of an image, and the worship of a Hindu Deity after the testator's death, and make such a bequest void?

(2) Whether the cases of *Upendra Lal Boral v. Hem Chandra Boral*, 25 Cal. 406, *Brojomoyee Dassi v. Tailokhya Mohini Dassi*, 29 Cal. 260, and *Nagendra Nandini Dassi v. Benoy Krishna Deb*, 30 Cal. 521, have been correctly decided in so far as they lay down the proposition that a gift to a Hindu Deity whose image is to be established and consecrated in future is void?

The Full Bench answered both questions in the negative.

Mr. H. D. Bose and Babus Manmotha Nath Mukherjee and Rama Kant Bhattacharya for the Appellants.

Babus Golap Chandra Sircar, Mohini Mohan Chakrabarty and Shib Chandra Palit for the Respondents.

CRIMINAL REVISIONAL JURISDICTION. Before COKE and RYVES, JJ. CRIMINAL REVISION No. 956 OF 1909. INDRA MOHON DUTY AND ORS. Petitioners v. THE EMPEROR, Opposite Party. 1st September 1909.

*Penal Code, secs. 143, 426 and 447—Separate conviction and sentences under secs. 426 and 447.*

The case for the prosecution was that the accused and many others went upon a plot of land belonging to the complainant and forcibly began to dig a ditch in the land. The complainant sent a servant to remonstrate, but the servant was chased off. Thereupon the accused came in front of the house of the complainant and abused him and his wife in filthy language. The accused party then completed the digging of the ditch and cut and took away a *pitkila* tree. The defence was that the case was entirely concocted and the accused were falsely implicated because the party of the accused had excommunicated Sarat Babu, the maternal uncle of the complainant. The Magistrate convicted the accused under secs. 143, 447 and 426, I. P. C., and sentenced them to fine under each of the sections.

The Petitioners moved the Sessions Judge who declined to interfere with the following remarks: "The Court finds that more than 5 persons including the accused assembled with the common object of digging a ditch through lands in possession of Sarat Babu. It is evident also that the elements of secs. 447 and 426, I. P. C., are also present. We have therefore all the elements of all the sections under which the Appellants have been convicted. There can therefore be no bar to conviction under these sections." The Petitioners then moved the High Court and obtained this rule.

Their Lordships observed:—

"This is a rule upon the District Magistrate of Dacca to show cause why the conviction and sentences of the Petitioners under sec. 447, I. P. C., should not be set aside."

"It appears to us that the Petitioners should not have been separately sentenced under sec. 426 and under sec. 447, the mischief being according to the Magistrate's explanation, the object of the trespass. It is unnecessary therefore to retain the conviction under sec. 447, I. P. C."

Babu Atulya Charan Bose for the Petitioners.

*Rule made absolute.*











